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In The

Supreme Court of the United States

October Term, 1998

JAN P. JUMONVILLE, WIFE OF/AND
PLACIDE J. JUMONVILLE

Petitioners

v.

CITY OF KENNER

Respondent

On Petition For Writ Of Certiorari

To The Fifth Circuit Court of Appeals and
the Supreme Court of Louisiana

PETITION for WRITS OF CERTIORARI

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QUESTIONS PRESENTED

This action arises under petitioners' inalienable right to peaceably possess and build his home. These fundamental property rights are guaranteed to each and every citizen under the Louisiana State Constitution and the Constitution of the United States, under the 14th Amendment, due process and equal protection. The record and judgments in the lower court confirm that the respondent, city governmental body, used its power, might and unlimited funds to crush petitioners by an invalid exercise of police power which continues to infringe arbitrarily, oppressively and unreasonably upon petitioners' private property rights abridging use. Such decisions create an intolerable government who can step beyond the words of the laws to legislate as they deem fit.

The question presented is whether the action by the lower courts violated an elemental principle of due process values that "an enactment is void for vagueness if its prohibitions are not clearly defined" by interpreting the city's ordinance, building code and regulations to order deadlines for completion of work on petitioners' home.

Further question presented is whether the courts below erroneously violated petitioners' rights to the use and peaceable possession of their home under the Louisiana State Constitution and United States Constitution, under the 14th Amendment in violation of due process and equal protection, using an invalid exercise of police power to do so.

Further question presented is whether the lower courts erred in not addressing the constitutionality of La.R.S.13:4611 or remanding the issue for contradictory hearing in the lower court.

Further question is whether petitioners waived their State and Federal Constitutional rights in the lower courts reading beyond the four corners of a consent judgment and whether there was a valid consent judgment between the respondent and petitioners because of unilateral error.

Further question is whether the lower courts

erred in not affording petitioners their constitutional protection applicable in a civil contempt proceeding criminal in nature and whether the lower courts decisions were manifestly erroneous or clearly wrong in finding petitioners were in contempt for wilful noncompliance with its orders, and therefore, should be force to pay the harsh and extreme fines of almost $ 10,000.00 or be imprisoned.

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CITY OF KENNER

Respondent

V.

JAN P. JUMONVILLE, WIFE OF/AND
PLACIDE J. JUMONVILLE

Petitioners

PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS AND THE SUPREME COURT FOR THE STATE OF LOUISIANA

Jan P. Jumonville and Placide J. Jumonville, petition for a writ of certiorari to review the judgments of the Supreme Court of Louisiana rendered in this proceeding on January 30, 1998, the judgment and opinions rendered on August 27, 1997 of the 5th Circuit Court of Appeals, State of Louisiana, and the judgment and opinion of the 24th Judicial District Court for the Parish of Jefferson.

OPINIONS BELOW

The amended opinion of the District Court is unreported and is reproduced in the Appendix. The opinion of the Fifth Circuit Court of Appeals is reported at 701 So.2d 223 and is reproduced in the Appendix. The Supreme Court of Louisiana's denial of petitioners' application for writs of certiorari, prohibition and/or mandamus is unreported and is reproduced in the Appendix A.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1997 and the denial of writs of certiorari, prohibition and mandamus to the Supreme Court of Louisiana was denied on January 30, 1998. This Court has jurisdiction over this matter pursuant to 28 U.S.C.A. 1257le 7, Sections 2 and 28 U.S.C. 2403(b) may apply.

STATUTORY PROVISION INVOLVED

This case involves application of the following language:

No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. **U. S. Constitution, Amendment V.**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. **U. S. Constitution, Amendment XIV, Section 1:**

No person shall be deprived of life, liberty or property, except by due process of law. **La. Const. Art. 1 Sect. 2.**

Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy and dispose of it within the limits and under the conditions established by law. **Louisiana Civil Code Article 477.**

STATEMENT OF THE CASE

On August 6, 1993, the City of Kenner (hereafter the "City") issued a building permit to Mr. Placide J. Jumonville, a home owner, for

interior and exterior renovation work to his home at 50 Granada, Kenner, LA. In order to financially afford the scope and quality of renovations he desired for his home, Mr. Jumonville worked with and directed all renovation work. This work on his home, far above the Building Code and standards of the City, continues on a daily basis except for normal delays due to weather, illness, material acquisition and turnover of workers.

In order to coerce the Jumonvilles into rushing the completion of their home, on April 18, 1995, the City filed a Petition for Preliminary and Permanent Injunction, in direct violation of La.C.C.P. Article 863, falsely alleging numerous violations of the City's Ordinance 1427, and specifically Section 5-84, for allegedly not "prosecuting" the renovations in accordance with the building permit issued to them, and seeking to enjoin the Jumonvilles from further alleged violations and to compel them to complete their renovations under arbitrary deadlines.

From the issuance of the original building permit in August 1993 up to the date of the filing of this Writ to the United States Supreme Court, no citation for any Code or Building violation has ever been issued by the City to the Jumonvilles nor has any evidence ever been presented in the district court proceedings to support their false allegations of building code violations or failure to continuously renovate their home.

The Jumonvilles filed an Exception, Answer, Reconventional Demand and Third Party Demand, denying the allegations of the City and alleging the following:

"(1) The City performed no inspections on the property, which was locked and inaccessible, to appraise its safety;
(2) The City repeatedly advised the Jumonvilles the construction work at 50 Granada far exceeded the Code requirements of the City;
(3) The City singled out the Jumonvilles because of complaints by Councilwoman Jeannie Black and/or other politicians, who have used their political position to harass defendants during

the course of this custom construction to satisfy their constituents and because they want the construction completed on a completely arbitrary time schedule;

4) The City engaged in selective enforcement of its ordinances by allowing and condoning numerous violation to exist by property owners in the same location without citation or warning;

(5) The City did not respond to the Jumonvilles' request to amicably resolve their allegations, only demanding a date for completion of construction work rather than defining the vague allegations in their correspondence;

(6) The City violated the **rights of the Jumonvilles to use and control their private property, a civil right granted under the provisions of Article 1, Section 4 of the Louisiana Constitution of 1974.**

(7) The City is in violation of C.C.P. Article 863 in that the petition is interposed for an improper purpose to satisfy political persons and their constituents, is not well grounded in fact and no reasonable inquiry or inspection has been made.

(8) The **City acted under official policy and custom, with gross negligence and/or deliberate indifference to the constitutional rights of the Jumonvilles**, by failing to properly investigate and inspect the property, failing to properly and adequately train and supervise their Code enforcement personnel in the inspection of the Code of ordinances building regulations.

(9) The Jumonvilles alleged they were entitled to all reasonable expenses and attorney's fees under C.C.P. Article 863, C.C.P. Article 3608 and 42 USC Section 1988."

Even though the City admitted that they had no law requiring the Jumonvilles to complete the renovation work by a deadline, in order to stop the harassment, coercion and duress by the City and because of the extended cost in personal time to the Jumonvilles, the cost in business time to Jan Jumonville and her law partner, Patrick Lee, away from their practice, the additional court cost and protracted litigation with a government body who has

unlimited resources, **(and now have used taxpayers money to pay over $ 92,000 in attorneys' fees as of June 1997)** and no court cost, the Jumonvilles signed a Consent Judgment agreeing to complete the renovation work by certain dates based on Mr. Jumonville's belief that he could complete the agreed upon renovation within the deadlines established by the City. Although Mr. Jumonville had the physical and engineering capabilities to build, he had absolutely no experience as a "professional contractor" and therefore no knowledge that the time frames he agreed to were impossible. Further, at the time of the signing of the Consent Judgment, he did not know nor could he have known of the hidden defects in the structural integrity of his home, nor of the myriad problems he would encounter hiring labor and acquiring materials. Therefore, on February 26, 1996, he *entered into a consent agreement in good faith, but with absolutely no understanding that it was impossible to accomplish.*

On February 23, 1996, the Judge signed this Consent Judgment, which document itself supports Mr. Jumonville lack of understanding, since it provides no additional time for weather, availability of material nor turnover of workers. The City, with superior knowledge of the construction business through its experts and Building Permit and Code Enforcement personnel, was familiar with such problems and knew the Consent Judgment specifically lacked these provisions, all as evidenced in the transcript in the record, by the cross-examination of Mr. Jumonville by the City's attorney, James Maxwell, at the trial in October 1996. This Consent Judgment, totally one sided, provided nothing in return to the Jumonvilles from the City other than to issue future permits already required to be issued by law. This consent judgment did not end this litigation nor did it dismiss or even address the Jumonvilles' Reconventional Demand and Third Party Demand which were never set for hearing. The order for hearing specifically only set the City's Petition for Injunction for trial on the merits. Still pending before the court is the Jumonvilles' Reconventional Demand and Third Party Demand which have never been heard, decided nor settled.

As the transcript of the hearing on October 1997 confirms, although construction has been continuous on a daily basis to date, Mr. Jumonville contended with numerous construction problems he was unaware were common in this line of work, including the discovery of hidden structural problems in May 1996, and the realization of the time required for the quality of construction he desired.

Through excavation of the garage slab in May 1996, the Jumonvilles found no pilings under the monolithic slab (one contiguous slab for the house, patio and garage) and in June 1996, Mr. Jumonville contacted Dr. Neil Hall, a structural engineer, who recommended "reinforcement of the slab at the locations noted above is highly advised." Dr. Hall further stated that "at the time of our inspection on July 1, 1996, the framing system, pilings, sheathing and roof decking for the residence was in place, and work *was* ongoing on a daily basis; ***however, work should not proceed without the advice of a professional engineer or a licensed foundation contractor.***"

The uncontradicted testimony of **Mr. Roy Carubba**, an **Expert in Structural Engineering**, at trailn October 17, 1996 was he found obvious subsidence of soil around the monolithically poured slab, noted two pilings offset from the house perimeter and another two offset on the side which could inhibit the slab and reduce the overall load carrying capacity of the slab. He was unable to find pilings under the garage or patio, a situation which could cause some damage or settlement failure to the main portion of the house. The lack of pilings could affect the overall structural integrity of the house and it would be a very prudent thing to drive additional pilings to ensure structural integrity of this particular residence.

Mr. Carubba pointed out a well known condition in Louisiana, "...in South Louisiana, it rains every day during the summer. (II:284). "If it rains every day, you can't do any work".(II:285). He explained construction can be completed within a certain time frame... **"if it doesn't rain every day and you have people show up every day and all the other problems that can go wrong in construction..."** (II:285).

Dr. Neil Hall's opinion agreed with Mr. Carubba: **These conditions would have remained undiscovered except for the physical excavation of the soil during the present course of construction. This could not have been surmised during the planning phase of the project since the surface of the concrete slab, except for a few hairline curing cracks due to age show no indication of distress."**

"Work should not proceed without the advise of a professional engineer or a licensed foundation contractor." (II:294-295).

As a result of these opinions, Mr. Jumonville filed an application for a piling permit with the City who never responded or approved same.

Mr. Carubba testified that if the pilings were not driven, he *could not guarantee the structural integrity of this residence* given the added weight which was going to be placed on the foundation. He absolutely confirmed that the pilings should be driven prior to the installation of the exterior brick veneer, the windows and the roof. If done otherwise, Mr. Carubba advised Mr. Jumonville would be risking damage to the exterior of his home and the safety of himself and his workers.

In light of the serious and compelling recommendations by structural engineers, Mr. Jumonville continued renovation work except for that which would jeopardize the structural integrity of his home.

When it became apparent to Mr. Jumonville that he could not possibly comply with the arbitrary deadlines set forth in the Consent Judgment, on August 9, 1996, the Jumonvilles filed a Motion to Modify Judgment, requesting the Judge to amend the Consent Judgment previously rendered in this matter and grant them additional time to investigate and effect repairs as recommended. Instead of either approving or disapproving the piling permit, on August 20, 1996, the City filed a Memorandum in Opposition, and their own Motion to Modify Consent Judgment, asking the court to hold the Jumonvilles in contempt and fine them $ 1000 a week until their home was completed.

On September 3, 1996, the City filed their 1st Rule for Contempt, again asking the judge to hold the Jumonvilles in contempt, fine them, but even more ***egregious, cast them into prison***.

Unable to proceed forward without a piling permit from the City, on October 3, 1996, the Jumonvilles filed a Rule for Contempt and Memorandum against the City seeking to compel issuance of the permit.

The Motions to Modify the Consent Judgment and Motions for Contempt proceeded to **trial on October 4, 1996**. Mr. Jumonville testified to the fact that he was not a contractor, and had no knowledge of the delays in dealing with merchants, carpenters and laborers necessary to complete the work, install the windows and doors and other various aspects of the work. Through his inexperience, he explained he had underestimated the time required to complete the work and did not consider weather or construction delays when he agreed to the Consent Judgment.

Following Mr. Jumonville's testimony, **trial was continued to October 17, 1996**. Eight days before October 17, 1997, **after** Mr. Jumonville's testimony on October 4, 1996, that the City had still not approved or disapproved a piling permit, and **two (2) months after** the application for a piling permit, the City engineer finally drafted a letter to Mr. Jumonville advising him for the **first** time he required plans from an architect or engineer to approve the permit.

On October 17, 1996, Mr. Jumonville's architect, Peter Waring, and structural engineer, Mr. Roy Carubba, testified to the work completed and the problems which supported the Jumonvilles' inability to comply with the Consent Judgment. This testimony is contained in the transcript in the record. Following their testimony, the Jumonvilles rested their case. Then, the City, <u>without calling one witness to prove their numerous allegations or contradict the evidence presented by the Jumonvilles</u>, rested.

At the trial, the Jumonvilles specifically **proved** they made a unilateral error as to a fact

that was a principle cause of the Consent Judgment, i.e., an unknown structural defect in the foundation which made the deadlines impossible.

At the trial, the *City specifically* ***failed to prove***:

1. The Jumonvilles knew or should have known of the hidden defects and construction problems which prevented them from complying with the consent judgment;
2. The Jumonvilles had ample time to complete the work;
3. The work had not been ongoing during the period since the permit was granted;
4. The Code in effect when the permit was issued provided that the construction must be completed by a date certain, which it does not;
5. One unsafe condition or violation of the building code ever existed, which it did not;
6. Any nuisance whatsoever;
7. Any offense or manifest evil;
8. Any injurious affects to public health, safety, morals and general welfare;

and *most importantly the City failed to prove:*

9. ***The Jumonvilles intentionally, knowingly and purposely disobeyed without justification the Consent Judgment, which they did not.***

After the parties rested on October 17, 1996, the Judge orally rendered judgment, finding the Jumonvilles in contempt, ordering them to pay the City $ 1000.00, even though the City proved no damages, along with all cost, and ordering a revised schedule of work to be completed by the Jumonvilles. In further violation of the constitutional rights of the Jumonvilles, the Court held that if the Jumonvilles did not comply with this illegal judgment, the court would hold them in further contempt and fine them from $ 50 to $ 200 per work day.

Judgment was signed on October 18, 1996 and amended on October 23, 1996. The judgment of October 23, 1996 granted the City of Kenner's Petition for Injunction, *an order with no basis*

whatsoever in law, and with no law ever cited by the City or the Court to support the imposition of arbitrary deadlines to complete construction, all in violation of the constitutional rights of the Jumonvilles.

On November 5, 1996, the Jumonvilles filed a Petition for Suspensive and/or Devolutive Appeal and Order to the October 18 & 23, 1996 judgments, and were granted a Devolutive Appeal with Bond.

The issues raised on appeal # 97 CA 125 were:

"1. Do the judgments of October 18 and 23, 1996 violate the Jumonvilles' constitutional rights guaranteed under the Louisiana Constitution and Constitution of the United States, under the 14th Amendment and violate due process and equal protection under the laws of the State and the United States?

2. Are the deadlines set for completion of renovation in the judgments of October 18 and 23, 1996 a valid exercise of police power in that it prevents some offense or manifest evil or preserves the public health, safety, morals, or general welfare?

3. Are the deadlines in the judgments of October 18 and 23, 1996 reasonably adapted to a public end not arbitrary, oppressive or unreasonable?

4. Are the judgments of October 18 and 23, 1996 in degradation of the Jumonvilles' constitutional right to peaceable possession of their property?

5. Is an ordinance that purports to vest arbitrary discretion without describing any definite rule for guidance unconstitutional?

6. Did the Jumonvilles knowingly and purposely, without justifiable excuse, disobey the Consent Judgment?

7. Is the City in contempt for failure to approve or disapprove the piling permit and in violation of Article 863 so that they should be fined attorney fees and all cost?"

On December 30, 1996, the City filed yet another Rule for Contempt of Court, again alleging that the Jumonvilles had not complied with arbitrary deadlines set forth by the Court in its October 23, 1996 judgment, and seeking additional fines, penalties, attorney fees and cost to be imposed on the Jumonvilles. This matter was set for hearing on Tuesday, January 21, 1997.

Even though the appeal was pending on the Judgments of October 18 and 23, 1996, the Jumonvilles were forced to yet another trial on the same issues and on January 23, 1997, the Judge *again* held the Jumonvilles in contempt for being unable to complete the renovations.

In conjunction therewith, the Jumonvilles filed a Petition for Writs of Certiorari, Prohibition and Mandamus on February 28, 1997 to the Judgment of January 23, 1997.

The issues raised on writ #97 C 210 were:

"1. Do the judgments of October 18 and 23, 1996 and January 23, 1997 violate the Jumonvilles' constitutional rights guaranteed under the Louisiana Constitution and Constitution of the United States, under the 14th Amendment and violate due process and equal protection under the laws of the State and the United States and in degradation of the Jumonvilles' peaceable possession of their property?"

Again, despite the two pending appeals of the judgments of October 23, 1996 and January 23, 1997, on March 17, 1997, the City of Kenner filed a 3rd Motion for Contempt based on the same prior allegations, asking the Court to hold the Jumonvilles in contempt and ***"be imprisoned"*** for failure to comply with the Judgments of October 23, 1996 and January 23, 1997.

On May 23, 1997, the Jumonvilles were forced to defend a third Motion for contempt for the same

allegations. A judgment on the Motion was signed June 16, 1997, finding the Jumonvilles in contempt of the Consent Judgment of February 22, 1996, and also in contempt of the court's orders of October 23, 1996, and January 23, 1997, and ordering the Jumonvilles to pay a fine of $ 9050.00 by 1:30 p.m. on June 20, 1997, in excess of the maximum fines allowed under La.R.S. 13:4611 or they would be imprisoned.

On June 20, 1997, the Jumonvilles filed a Petition for Writs of Certiorari, Prohibition and Mandamus with a motion for a stay of the above judgments.

The issues addressed on writ # 97 C 602 were:

"1. In La. R.S. 13:4611 unconstitutional?

2. Did the district judge abuse her discretion in ordering the payment of $ 9050.00 in excess of the maximum fines under La.R.S. 13:4611(1)(d) and the imprisonment of the Jumonvilles for failure to pay the excessive fine?"

On June 20, 1997, the Fifth Circuit granted a stay of all proceedings, granted the above writ and consolidated all writs and appeals.

Following the briefs filed and oral argument, the Fifth Circuit denied relief as to the issues raised on the Writ and affirmed all judgments on appeal except to reduce the fines by $ 500.00 and awarded all fines to the district court as opposed to the City of Kenner.

On September 10, 1997, the Jumonvilles filed an Application for Rehearing. The rehearing issues were:

"1. The Court should consider the Exhibits referred to and attached to the Jumonvilles' brief as the originals were entered into evidence and lodged with the Court in these consolidated proceedings.

2. This court should allow the record to be supplemented with the pleadings filed and the

transcripts of the hearings subsequent to October 1996.

3. The constitutional issues raised by the Jumonvilles are properly before the court; alternatively, these issues should be remanded.

On October 17, 1997, the Fifth Circuit refused Rehearing without reasons.

On November 18, 1997, the Jumonvilles files a Petition for Writs of Certiorari, Prohibition and Mandamus with the Supreme Court of Louisiana.

The issues and errors raised on writ # 97 CC 2890 were:

"1. The court erred in finding a valid consent judgment between the City of Kenner and the Jumonvilles because the Jumonvilles made a unilateral error as to a fact which was the principle cause for making the contract and the City of Kenner knew it was the principle cause.

2. The court erred in finding the Jumonvilles waived their state and federal constitutional rights and reading beyond the four corners of the consent judgment.

3. The Fifth Circuit erred in sanctioning an invalid exercise of police power which infringes arbitrarily, oppressively and unreasonably upon private property rights abridging use, and which exercise does not prevent some offense or manifest evil or the preservation of the public health, safety, morals, or general welfare.

4. The Fifth Circuit erred in violating an elemental principle of due process values that "an enactment is void for vagueness if its prohibitions are not clearly defined" when the court interpreted the City of Kenner's ordinance, building code and regulations to order deadlines for completion of work by the Jumonvilles.

5. The Fifth Circuit erred in sanctioning the denial of the Jumonvilles' constitutional rights guaranteed under the Louisiana constitution and constitution of the United States, under the 14th amendment in violation of due process and equal protection under the laws of the state and the united states and denied the Jumonvilles' peaceable possession of their property.

6. The Fifth Circuit erred in review of whether their was wilful noncompliance to find contempt when the fifth circuit departed from the jurisprudence by failing to apply the standard of manifest error or clearly wrong to the district court and where the overwhelming testimony and evidence was uncontradicted.

7. The appellate court erred in not addressing the constitutionality of LA.R.S.13:4611 or remanding the issue for contradictory hearing in the lower court.

8. The court erred in not affording the Jumonvilles there constitutional protection applicable in a civil contempt proceeding criminal in nature.

9. The appellate court erred in ordering the Jumonvilles to pay a fine of $ 500.00 to the district court and $ 9050.00 for three findings of contempt or imprisonment."

On January 30, 1998, the Supreme Court of Louisiana denied writs.

REASONS FOR GRANTING A WRIT

The Louisiana State Fifth Circuit Court of Appeals has decided important question of law in a way that conflicts with the decisions of the United States Supreme Court bearing on elemental principle of due process values and the use and peaceable possession of their home under the United States Constitution, under the 14th Amendment in violation of due process and equal protection and using an invalid exercise of police power to do so. Further the state courts erred in not addressing the

constitutionality of La.R.S.13:4611 or remanding the issue for contradictory hearing in the lower court and further denied petitioners' Federal Constitutional rights in the lower courts reading beyond the four corners of a consent judgment and in not affording petitioners their constitutional protection applicable in a civil contempt proceeding criminal in nature.

I. THERE WAS NO VALID CONSENT JUDGMENT BETWEEN THE CITY OF KENNER AND THE JUMONVILLES BECAUSE THE JUMONVILLES MADE A UNILATERAL ERROR AS TO A FACT WHICH WAS THE PRINCIPLE CAUSE FOR MAKING THE CONTRACT AND THE CITY OF KENNER KNEW IT WAS THE PRINCIPLE CAUSE.

The City of Kenner strenuously and vehemently argued the validity of the Consent Judgment as a bilateral contract between the parties. They mistakenly argued, and the Fifth Circuit ignored the law that a contract may be invalidated by unilateral error of one of the parties. It is well settled in Louisiana law that consent to a judgment or contract may be vitiated by an error of fact and that without consent there is no contract. LSA-R.C.C. Articles 1819, 1890, 1923(1870).

Article 1821(1870) states:

" That is called error of fact, which proceeds either from *ignorance of that which really exists, or from a mistaken belief in the existence of that which has none.*"

Article 1948 states:

"Consent may be vitiated by error, fraud or duress.

Article 1949 states:

"Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party."

Article 1950 states:

"Error may concern a cause when it bears on the nature of the contract, or the thing that is the contractual object or a substantial quality of that thing, ... or any other circumstances that the parties regarded or should in good faith regarded,

as a cause of the obligation."

The undisputed evidence is that the principle cause of the Consent Judgment was the City of Kenner's desire to have the house renovations completed by certain dates. However, at the time of entering the Consent Judgment, Mr. Jumonville was completely unaware of the hidden defects affecting the structural integrity of the slab. This constituted a unilateral error as to a fact, i.e., there were no structural defects in the house. This error specifically affected the time frame within which Mr. Jumonville agreed to complete portions of the residence, i.e., the principle cause for making the contract. Therefore, the Consent Judgment, and any judgments flowing therefrom, are invalid.

The Fifth Circuit relied heavily on Martin Forest Products v. Grantadams, 616 So.2d 251(La. App. 2 Cir. 1993),a case completely distinguishable.

In the present case, the primary motive was completion of the renovations by certain dates. Petitioners never stipulated their property was a nuisance, or the City was entitled to an injunction, or waived their state and federal constitutional rights. Mr.Jumonville had no building, architectural or engineering expert advise him that he could complete the renovations by the proscribed dates. Further, unlike Martin, after an engineering expert advised Mr. Jumonville of the dangers of continuing the renovations under the proscribed schedule, he sought piling permits from the City to insure the structural integrity of his home and the safety of his neighbors. The Jumonvilles brought two experts whose uncontradicted testimony supported Mr. Jumonville's testimony he made an error of fact in agreeing to the Consent Judgment. Mr. Jumonville has repeatedly testified that he intends to complete his home and the evidence presented proves that work continues on a daily, full time basis.

II. THE JUMONVILLES DID NOT WAIVE THEIR STATE AND FEDERAL CONSTITUTIONAL RIGHTS IN THE CONSENT JUDGMENT.

La. C.C. Article 2046 states:

When the words of a contract are clear and explicit and lead to no absurd consequences, *no further interpretation may be made in search of the parties' intent.*

Under this Article, when a clause of a contract is clear and unambiguous, the letter of that clause *should not be disregarded under pretext of pursing its spirit.* Maloney v. Oak Builders, Inc., 256 La. 85, 235 So.2d 386(1970)

The Consent Judgment is clear and unambiguous and should be read within its four corners. It agrees to the completion of portions of the construction work and only that. The Jumonvilles did not admit any allegations of the City of Kenner's Petition nor did they dismiss their claims, Answer, Reconventional Demand and Third Party Demand. The Consent Judgment does not stipulate that the Jumonvilles' actions were a nuisance, that the City of Kenner was entitled to an injunction, that the City is entitled to damages, or that the Jumonvilles waived their State and Federal Constitutional Rights. The Jumonville only agreed to complete work by certain dates. There are no words susceptible to a different meaning.

To broaden the Consent Judgment to deny the Jumonvilles' State and Federal Constitutional rights is clearly wrong. Our Constitution provides that the only legitimate end of government is to secure justice to all, with the courts open to persons injured in his property who shall have remedy by due process of law. No person shall be deprived of life, liberty or *property, except by due process of law.* La. Const. Art. 1 Sect. 2.

III. THE FIFTH CIRCUIT ERRED IN SANCTIONING AN INVALID EXERCISE OF POLICE POWER WHICH INFRINGES ARBITRARILY, OPPRESSIVELY AND UNREASONABLY UPON PRIVATE PROPERTY RIGHTS ABRIDGING USE, AND WHICH EXERCISE DOES NOT PREVENT SOME OFFENSE OR MANIFEST EVIL OR THE PRESERVATION OF THE PUBLIC HEALTH, SAFETY, MORALS, OR GENERAL WELFARE.

In the case of City of New Orleans v. Southern Auto Wreckers, 192 So. 523(La. 1939),the president of a junk yard company was prosecuted for failure to

build and maintain a fence as specifically set forth by City Ordinance, convicted and fined with order of imprisonment for failure to pay the fine. The president, incarcerated, appealed to the Supreme Court. Finding the ordinance unconstitutional, the conviction and sentence were set aside and the president released.

The Supreme Court cited the general rule which prevails here and elsewhere as stated in C.J., Section 228, page 227:

" In order that a municipal regulation may be sustained as an exercise of the police power, the regulations must ***have for its object the prevention of some offense or manifest evil or the preservation of the public health, safety, morals, or general welfare***. The exercise of the police power must have a substantial basis. The power can not be made a mere pretext for legislation that does not fall within it. There must be some clear, real, and substantial connection between the assumed purpose of the regulation and the active provisions thereof, and the provisions must in some plain, appreciable and appropriate manner tend towards the accomplishment of the object for which the power is exercised." P. 526;

The Supreme Court found the ordinance purely arbitrary and unreasonable:

" While the police power of municipalities is broad and far-reaching, it is not without limitations. In the exercise of that power, municipalities may go to the boundaries of reason but no further....But the exercise of that power for such purposes, without adequate reasons, is **a violation of the Due Process Clause of the State and Federal Constitutions**. Const. La. 1, Section 2; U.S.C.A. Const. Amend. 14.

Municipal police power may not be exercised to infringe arbitrarily or unreasonably upon personal or private property rights.

In speaking of the rights of individuals to use their private property as they see fit, as long as their use of it is not offensive or dangerous, it is

stated in American Jurisprudence, Volume 11, Sec. 279, p. 1037:

' ***Nevertheless, the owner has a right to erect such structures or to use the property for such legitimate purposes as he sees fit, utilizing such portions of it as he pleases, as long as in so doing he in no manner injuriously affects the public health, safety, morals, and general welfare.*** Any law abridging rights to a use of property, which right does not infringe the rights of others, or limiting the use of property beyond what is necessary to provide for the welfare and general security of the public is not a valid exercise of the police power.' " P. 527.

Louisiana courts have continued to hold municipalities to this standard City of Lafayette v. Butcher Air Conditioning, 392 So.2d 759 (La. App. 3 Cir. 1980); Hi-Lo Oil Company v. City of Crowley, 274 So.2d 757, 762(La. App. 3 Cir. 1973).

Any ordinance or law which imposes restrictions upon the use of private property should be strictly construed. City of Baton Rouge v. Allen, 106 So. 740(La. App. 1 Cir. 1958).

The federal and state governments are prohibited from depriving a person of life, liberty or property without due process of law. U.S. Const. Amends. V, XIV; La. Const. art. 1, Sec. 3(1974). " The test of whether an ordinance is a constitutionally valid exercise of police power depends on whether under all the circumstances, the regulation is reasonable and whether it is designed to accomplish a purpose properly falling within the scope of the police power." Wes-T-Erre Dev v. Parish of Terrebonne, Etc., 416 So.2d 209(La. App. 1 Cir.), writ denied, 421 So.2d 251(La. 1982). " If the reasons are not adequate, such legislation ***violates the due process clauses of the Constitutions.***" Board of Examiners of Louisiana v. Parker, 190 La. 214, 182 So. 485(1938) and Hi-Lo Oil, supra. P. 761. The means adopted by an ordinance must be reasonably adapted to a public end and must not be arbitrary, oppressive or unreasonable. City of Crowley Firemen v. City of Crowley, 264 So.2d 368(La.App.3 Cir. 1972).

In the present case there is no law whatsoever to support the imposition by the Court of a deadline to complete construction. What offense, manifest evil or preservation of the public health, safety, morals, or general welfare can the imposition of deadlines prevent in this case? There are no building code violations or safety hazards. The City of Kenner has no reasonable or rational justification to impose such a deadline to complete the Jumonville home.

As noted by the court in Apex Oil Company V. Allen, 357 So.2d 624(La. App. 1 Cir. 1978), ***it is not necessary to prove irreparable harm*** in order to obtain preliminary injunction relief when the injunction is sought on grounds that the action is reprobated by law.

IV. THE FIFTH CIRCUIT ERRED IN VIOLATING AN ELEMENTAL PRINCIPLE OF DUE PROCESS VALUES THAT "AN ENACTMENT IS VOID FOR VAGUENESS IF ITS PROHIBITIONS ARE NOT CLEARLY DEFINED" WHEN THE COURT INTERPRETED THE CITY OF KENNER'S ORDINANCE, BUILDING CODE AND REGULATIONS TO ORDER DEADLINES FOR COMPLETION OF WORK BY THE JUMONVILLES.

The City of Kenner alleged in their Petition that the Jumonvilles "violated City of Kenner's Ordinance 1427, and specifically, but not limited to Section 5-84 and Section 5-63 and specifically, but not limited to Article 305 of the City of Kenner Building Code and specifically the Kenner building regulations". Notwithstanding that the City presented no evidence whatsoever to support its allegations, ***none of these ordinances, codes and building regulations set forth deadlines for stages of construction or renovation work.***

In Duplantis v. Bonvillain, 675 F.Supp. 331(E.D. La. 1987), the Court stated:

" It is an elemental principle of due process values that 'an enactment is void for vagueness if its prohibitions are not clearly defined.' " City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289, 102 S.Ct. 1070, 1075, 71 L.Ed.2d 152 (1982) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2298, 33 L.Ed.2d 222 (1972). Central

to this thought is that people ought not have to guess about the law's meaning:

' [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'

Smith v. Goguen, 415 U.S. 566, 572 n. 8, 94 S.Ct. 1242, 1247 n.8, 39 L.Ed.2d 605 (quoting *Connally v. General Construction Company*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).

The offense to due process lies in both the nature and consequences of vagueness. First, vague laws do not give individuals **fair notice of the conduct proscribed**. Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972).

Second, **such laws fuel the possibility of arbitrary and discriminatory enforcement in that they fail to limit law enforcement officials' exercise of discretion**. *Grayned*, 408 U.S. at 108-109, 92 S.Ct. at 2298-99.

Third, vague laws 'defeat the purpose of, and frustrate the essence of, a constitutional regime. ***We remain 'a government of laws, and not of men'...only so long as our laws remain clear.'*** City of Mesquite, 455 U.S. at 290 n. 12, 102 S.Ct. at 1075 n. 12 (citation omitted)."

The Jumonvilles are in an unusual position. The trial court judgments were not based on the violation of any specific ordinance whatsoever since, as noted above, there is no ordinance setting forth deadlines for construction. However, the effect of the judgments on the Jumonvilles are the same as the enforcement of an unconstitutional ordinance. Thus, this Honorable Court should be guided by the standards and principles outlined in the cases noted herein above.

The plain and simple truth of this matter is that the City of Kenner has not, and indeed CANNOT, cite any law whatsoever to support its position the

Jumonvilles must complete the renovations of their home in conformity with any arbitrary deadlines. This is because no such law exists. The City has not offered or submitted into evidence one single citation to support its allegations of Code violations or Code deadlines. This is because no such Code violations or deadlines exist. The Jumonvilles have been, and are continuing to operate under a validly issued City of Kenner building permit, with work far exceeding Code requirements and under a building code which sets forth no deadlines of any nature whatsoever for construction or renovations performed thereunder.

V. THE FIFTH CIRCUIT ERRED IN SANCTIONING THE DENIAL OF THE JUMONVILLES' CONSTITUTIONAL RIGHTS GUARANTEED UNDER THE LOUISIANA CONSTITUTION AND CONSTITUTION OF THE UNITED STATES, UNDER THE 14TH AMENDMENT IN VIOLATION OF DUE PROCESS AND EQUAL PROTECTION UNDER THE LAWS OF THE STATE AND THE UNITED STATES AND DENIED THE JUMONVILLES' PEACEABLE POSSESSION OF THEIR PROPERTY.

Article 1, Section 4 of the Louisiana Constitution of 1974 protects the right of landowners to use and control his property and its peaceable possession. La. C.C. Article 477 states:

" Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy and dispose of it within the limits and under the conditions established by law."

As Judge Redmann stated in Simmons v. Board of Zoning Adjustments for City of New Orleans, 338 So.2d 752, 753(La. App. 4 Cir. 1976):

"One has the 'right to use, to enjoy and to dispose of one's property in the most unlimited manner, provided it is not used in any way prohibited by laws or ordinances.' C.C.491.".

See also City of New Orleans v. Southern Auto Wreckers, 192 So. 523(La. 1939), in which the Supreme Court defined the right of a property owner to the legitimate use of their property as they see fit and City of Lafayette v. Butcher Air

Conditioning, 392 So.2d 759 (La. App. 3 Cir. 1980); Hi-Lo Oil Company v. City of Crowley, 274 So.2d 757, 762(La. App. 3 Cir. 1973) in which our courts have continued to hold municipalities to this standard.

Any ordinance or law which imposes restrictions upon the use of private property should be strictly construed. City of Baton Rouge v. Allen, 106 So. 740(La. App. 1 Cir. 1958).

The federal and state governments are prohibited from depriving a person of life, liberty or property without due process of law. **U.S. Const. Amends. V, XIV; La. Const. Art. 1, Sec. 3(1974).** See also Wes-T-Erre Dev v. Parish of Terrebonne, Etc., 416 So.2d 209(La. App. 1 Cir.), writ denied, 421 So.2d 251(La. 1982).

" If the reasons (for a regulation) are not adequate, such legislation ***violates the due process clauses of the Constitutions.***" Board of Examiners of Louisiana v. Parker, 190 La. 214, 182 So. 485(1938) and Hi-Lo Oil, supra. P. 761.

VI. THERE WAS NO EVIDENCE OF WILFUL, KNOWING NONCOMPLIANCE OF THE CONSENT JUDGMENT AND JUSTIFIABLE REASON FOR NONCOMPLIANCE.

The trial court held the Jumonvilles in contempt of the Consent Judgment in the judgment of October 23, 1997. How can a court hold its citizens in contempt of a judgment that is unconstitutional? Even if the judgment was constitutional, the law and our Courts have long held that a party cannot be held in contempt unless he has *wilfully disobeyed or refused to honor a direct court order.* Under the provisions of La.C.C.P. Art. 221, ***'wilful disobedience means an act or failure to act that is done "intentionally, knowingly, and purposely, without justification".*** Nelson v. Nelson, 421 So.2d 366, 368(la. App. 1 Cir. 1982); Ferry v. Ferry, 444 So.2d 797(la. App. 3 Cir. 1984).

There was no evidence whatsoever in the October, 1996 trial, which is in the record, to support any intentional, knowing or purposeful act to not complete the Jumonvilles' home. The overwhelming evidence based on the uncontradicted

testimony of Mr. Jumonville, the uncontradicted corroborating report of Dr. Neil Hall, the uncontradicted testimony of Mr. Ray Carubba, structural engineer, and the uncontradicted testimony of Mr. Peter Waring, architect, and the uncontradicted physical documents and photographs clearly show that Mr. Jumonville's inability to meet the arbitrary deadlines was wilful or intentional, and that the judge was wrong in holding the Jumonvilles in contempt. This consent judgment was clearly entered into without realization of the numerous problems contractors face when building: rain, construction problems, movement of workers and hidden structural defect. The City offered no evidence whatsoever to contradict ongoing daily work and the problems encountered by the Jumonvilles as they attempted to complete the renovations. To fine and actually threaten to imprison the Jumonvilles is an atrocity in its most insidious form. It sanctions a City's use of unlimited taxpayers' money to prosecute, without any basis in law, individual citizens without the same financial resources to defend themselves. It encourages misuse of the courts to punish its citizens when there has been no violation of the law.

VII. THE APPELLATE COURT SHOULD HAVE ADDRESSED THE CONSTITUTIONALITY OF LA.R.S.13:4611 OR REMANDED THE ISSUE FOR CONTRADICTORY HEARING IN THE LOWER COURT.

In Champagne v. Champagne, 541 So.2d 933 (La.App. 5 Cir. 1989), the Fifth Circuit stated:

"We decline to address the constitutionality of La.R.S. 13:4611(1)(d), as that issue was not raised at the trial nor was an assertion of unconstitutionality pleaded prior to the brief's filing in this Court. Lemire v. New Orleans Public Serv., 458 So.2d 1308, 1311 (La. 1984); State of La. in the Interest of J.B., 499 So.2d 611, 612 (La.App. 5th Cir. 1986), writ not considered, 503 So.2d 8 (La. 1987), reconsideration granted, writ denied, 504 So.2d 870 (La. 1987). **Although not deciding, we find La.R.S. 13:4611 (1)(d) is patently unconstitutional.**"

The Fifth Circuit specifically found that the Jumonvilles had plead the constitutional issues in

their Reconventional and Third Party Demands but declined to address whether La.R.S. 13:4611(1)(d) was unconstitutional, claiming that issue was not argued before the trial court as required by Vallo v. Gayle Oil Co., Inc, 646 So.2d 859(La. 1994). Further, the Fifth Circuit found that the Jumonvilles had waived these constitutional defenses by signing the Consent Judgment. This rationale is contradictory to that espoused by this Court in Vallo.

Therein, this Court stated: "The requirement of specially pleading the unconstitutionality of a statute in pleadings implies that this notable issue will receive a contradictory hearing wherein all parties will be afforded an opportunity to brief and argue the issue...The record of the proceeding could then be reviewed to determine whether the party attacking the statute sustained his or her burden of proof, and whether the trial court attempted to construe the statute so as to preserve its constitutionality." p.865.

Therefore, the appellate court should either have held that the Consent Judgment constituted a declaration of the constitutionality of the statute, enabling appellate courts to address that issue or, more reasonably, should have remanded this "notable issue" to the lower court for a full contradictory hearing and creation of a record for appellate review as dictated by this Court's decision in Vallo.

VIII. THE JUMONVILLES WERE NOT AFFORDED THEIR CONSTITUTIONAL PROTECTIONS APPLICABLE IN A CIVIL CONTEMPT PROCEEDING CRIMINAL IN NATURE.

In the May 23, 1997 judgment, the district court fined the Jumonvilles $ 9050.00 to be paid to the City of Kenner by June 20, 1997 or be thrown in jail. The Fifth Circuit amended the judgment to reduce the fine by $ 500.00 and ordered the fines paid to the court (instead to the City) to vindicate the authority of the court.

The trial court's primary purpose in imposing sentence determines whether contempt proceedings are civil or criminal in nature. It is considered

criminal if the purpose is to punish disobedience of a court order. State In Interest of R.J.S., 493 So.2d 1199, 1202(La. 1986); Geo-Je's Civic Ass'n, Inc. v. Reed, 525 So.2d 192(La. App. 1 Cir. 1988). A further indication of the trial court's primary purpose is where the defendant is not given an option they are able to comply with rather than going to jail. State v. Hope, 449 So.2d 633(La. App. 1 Cir. 1986).

This court addressed criminal contempt in a civil proceeding in Champagne v. Champagne, 541 So.2d 933(1a. App. 5 Cir. 1989), citing the United States Supreme Court case of Feiock v. Feiock, 485 U.S. 624, 108 S.Ct. 1423, 99 L.Ed. 2d 721(1988):

"But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court." Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441, 31 S.Ct 492, 498, 55 L.Ed. 797 (1911). The character of the relief imposed is thus ascertainable by applying a few straightforward rules. If the relief provided is a sentence of imprisonment, it is remedial if "the defendant stands committed unless and until he performs the affirmative act required by the court's order," and is **punitive if "the sentence is limited to imprisonment for a definite period."** Id., at 442, 31 S.Ct. at 498. **If the relief provided is a fine, it is ...punitive when it is paid to the court**, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order. **These distinctions lead up to the fundamental proposition that criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings, including the requirement that the offense be proved beyond a reasonable doubt**. See, e.g., Gompers, supra, at 444, 31 S.Ct., at 499; Michaelson v. United States ex rel. Chicago, St. P., M. & O.R. Co., 266 U.S. 42, 66, 45 S.Ct. 18, 20, 69 L.Ed. 162 (1924)."

Further, in Feiock v. Feiock, supra, a court's imposition of a determinate sentence in a civil contempt hearing must include a purge clause. The Court clearly indicated that when it spoke of a

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imprisonment for not more than twelve months or both;

d) For any other contempt of court...by a fine of ***not more than five hundred dollars,*** *or imprisonment for not more than three months, or both."*

The trial court's fine is based on three findings of contempt, all for failure to complete work as set forth in the Consent Judgment, by her judgments of October 23, 1996, January 21, 1997 and June 16, 1997. R.S. 13:4611(1)(b) is inapplicable since the Jumonvilles have not disobeyed a lawful restraining order, or preliminary or permanent injunction.

The only applicable fines for contempt are found in La.R.S. 13:4611(1)(d) which provide for a fine of not more than five hundred dollars. Therefore, the maximum fine is five hundred dollars, since the finding of contempt arises out of the original order of October 23, 1996. All subsequent findings of contempt are based on the original judgment and even reference it as does the June 16, 1997 judgment. Alternatively, the court has found the Jumonvilles in contempt on three separate hearings. Even under this interpretation, the maximum fine is One Thousand Five Hundred, not Nine Thousand Fifty dollars.

CONCLUSION

This Court should set aside the Consent Judgment, the judgments of October 18 and 23, 1996 and all subsequent judgments that flow from the original judgments ordering deadlines and holding the Jumonvilles in contempt based on the undisputed fact that the consent judgment is invalid for a unilateral error by the Jumonvilles which was the principle cause for the Consent Judgment. The deadlines ordered by the court are unsupported by law or jurisprudence, are unconstitutional, usurp and violate the property rights guaranteed under the Constitution of Louisiana and the United States of America under the 14th Amendment, are in violation of due process and equal protection under the laws of the State and the United States and are in degradation of the Jumonvilles' peaceable possession

of their property.

The judgments serve no legitimate purpose that protects the general health, welfare and morals of the citizens and is arbitrary, oppressive and unreasonable.

The overwhelming and undisputed evidence and testimony in the trial of October, 1996 show that the Jumonvilles did not wilfully disobey the court's orders, did everything reasonable to comply with the arbitrary deadlines but were unable to do so based on circumstances they could not foresee, did not know about, and could not control.

This Court should reverse the order of the trial court fining the Jumonvilles $ 9050.00 because there is no reasonable basis for contempt, the fine is excessive, La.R.S. 13:4611 is unconstitutional and the Jumonvilles were not afforded their constitutional protections applicable in a civil contempt proceeding criminal in nature.

Alternatively, the fine is in excess of the maximum fine provided under La.R.S. 13:4611(1)(d) and the trial court's judgment of June 16, 1997 should be reduced to $ 500.00 since the findings of contempt all arise out of the original finding of contempt in the judgment of October 23, 1996.

Alternatively, the maximum fine should be no more than $ 1500.00 since there are only three judgments of contempt.

Respectfully submitted,

JAN P. JUMONVILLE, NO. 7591
3621 Ridgelake Dr., Suite 303
Metairie, LA 70002
Phone No. (504) 837-3555
Attorney for Defendants/Petitioners
Jan P. Jumonville and
Placide J. Jumonville

VERIFICATION

STATE OF LOUISIANA
PARISH OF JEFFERSON

Before me, the undersigned authority, personally came and appeared JAN P. JUMONVILLE who being duly sworn, deposed and said that she is the attorney for Jan P. Jumonville and Placide J. Jumonville, Defendants-Petitioners, in the above proceedings;

That she has prepared and read the said Petition and that all of the allegations contained therein are true and correct;

That copies of this Petition have been served by U.S. Mail on April 30, 1998:

Judge Jo Ellen Grant, Division "I"
24th Judicial District Court,
Parish of Jefferson,
P. O. Box 10
Gretna, LA 70054
(504) 364-3910,

Mr. Kurt C. Garcia, Attorney for Respondent /Plaintiff, the City of Kenner
Concourse Pl., Ste 125, 1940 I-10 Service Road
Kenner, LA 70065
(504) 466-1331 and

State of LA.Attorney General Richard E. Ieyoub
P. O. Box 94005
Baton Rouge, LA 70804-9005
(504) 342-7013

JAN P. JUMONVILLE, La. Bar No. 7591
3621 Ridgelake Drive, Suite 303
Metairie, LA 70002
Phone No. (504) 837-3555
Attorney for Defendants/Petitioners,

Sworn to and subscribed before me this 30 day of April, 1998.

NOTARY PUBLIC

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Supreme Court, U.S.
FILED

No. 97 1799 APR 30 1998

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1998

JAN P. JUMONVILLE, WIFE OF/AND
PLACIDE J. JUMONVILLE

Petitioners

v.

CITY OF KENNER

Respondent

On Petition For Writ Of Certiorari

To The Fifth Circuit Court of Appeals and
the Supreme Court of Louisiana

APPENDIX FOR PETITION for WRITS OF CERTIORARI

JAN P. JUMONVILLE, BAR NO. 7591
3621 Ridgelake Drive., Suite 303
Metairie, LA 70002
PHONE NO. (504) 837-3555

ATTORNEY for Petitioners
Jan P. Jumonville and
Placide J. Jumonville

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TWENTY-FOURTH JUDICIAL DISTRIT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 481-536 DIVISION "I"

CITY OF KENNER

VERSUS

JAN P. JUMONVILLE,

WIFE OF/AND PLACIDE J. JUMONVILLE

FILED:_____ DEPUTY CLERK_____

CONSENT JUDGMENT

This Honorable Court, considering the pleading filed herein, and upon consent of the parties hereto, enters the following judgment:

IT IS ORDERED, ADJUDGED AND DECREED that the Defendants, Jan P. Jumonville and Placide J. Jumonville, owners of the immovable property located at 50 Granada Drive, Driftwood Subdivision, Kenner, Louisiana, shall complete the following exterior work on said immovable property

to the extent it resembles a finished and habitable home:

(1) The house shall be completely bricked, sided or a combination thereof;

(2) The windows shall be in place and operable;

(4) All doors shall be in place and operable;

(5) If the Defendants intend to have gutters on their home, the gutters shall be in place;

(5) The roof on the home shall be completed and shingled;

(6) If the defendants intend to put skylights on their home, the skylights shall be in place.

(7) The garage door shall be repaired with a covering of plywood or other similar subsurface facing material

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other similar subsurface facing material and painted with a color in conformity with the existing garage.

IT IS FURTHER ORDERS, ADJUDGED AND DECREED that the defendants complete all the work on the exterior of their home required under this consent judgment by August 31, 1996.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendants, Jan P. Jumonville and Placide J. Jumonville, shall complete the following work on the interior of their home located at 50 Granada Drive, Kenner, Louisiana:

(1) Plumbing lines shall be installed and "stubbed in" to final connection points within the home;

(2) Electrical wire installations shall be pulled and connected to outlets; and

(3) Mechanical, i.e., heating and cooling systems, shall be installed and roughed in to final destination point.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all interior work under this judgment shall be completed to the extent it passes plumbing, electrical and mechanical inspections by the City of Kenner, which approval the City of Kenner agrees not to unreasonably withhold, by February 28, 1997.

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JUDGMENT READ, RENDERED AND SIGNED at Gretna, Louisiana, this _ _____ day of _____, 1996.

_____
HONORABLE JO ELLEN GRANT

APPROVED AS TO FORM AND CONTENT AND SUBMITTED :

"S/Kurt C. Garcia
KURT C. GARCIA
Attorney for City of Kenner

"S/Patrick F. Lee
PATRICK F. LEE, Bar No. 7902
Attorney for JAN P. JUMONVILLE
and PLACIDE J. JUMONVILLE

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TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 481-536 DIVISION "I"

CITY OF KENNER

VERSUS

JAN P. JUMONVILLE, ET AL

FILED: 10/23/96 DEPUTY CLERK /s/

AMENDED JUDGMENT AND REASONS

This matter came for hearing on October 4 and October 17, 1996 on defendant's Motion to Modify the Consent Judgment and defense and plaintiff's Cross Motions for Contemp. By agreement of the parties, all motions were heard simultaneously. A typographical error was noted in three paragraphs of the Judgment signed Octoer 18, 1996.

PRESENT:

Kurt C. Garcia, James Maxwell and Glenn Ansardi, attorneys for plaintiff, City of Kenner.

Patrick Lee, attorney for defendants;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the judgment of this Court dated October 18, 1996 be amended pursuant to La.C.C.P. Art. 1951 to correct typographial errors. This judgment must correctly reflect the judgment read and rendered on the record by this Court on October 17, 1996. The judgment of October 18, 1996 is amended as follows:

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff's Motion for Contempt is GRANTED and defendant's Motion to Modify the Consent Judgment and Motion for Contempt are denied.

A8

This Court finds that the defendants are in contempt of the Consent Judgment signed by this Court on February 22, 1996. After listening to the testimony of Mr. Jumonville and the Jumonvilles' experts, Roy Carubba, a structural engineer, and Peter Waring, a licensed architect, this Court finds that the Jumonvilles failed, without just cause, to complete the work at number 50 Granada Drive, City of Kenner, in a timely fashion.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Court assesses the defendants one thousand dollars ($1,000.00) in penalties to be paid to the City of Kenner by October 31, 1996.

This Court establishes the following cut-off dates and penalties:

PHASE I

November 1, 1996 --- All plans, both structural and architectural are to be submitted in final form to the City of Kenner. There will be no variances requested.

November 15, 1996 (or any date prior to) --- City of Kenner is to have approved plans and all necessary permits issued.

30 days from the date the permit is granted --- All structual work including all necessary pilings must be completed

*** A fifty Dollar ($50.00) per day fine (5 day work week excluding holidays) will be assessed against the Jumonvilles for every day this work has not been completed.

- A10

45 days from the date the permit is granted --- All framing, including the dormers and the gable are to be completed.

*** A fifty dollar ($50.00) per day fine (5 day work week excluding holidays) will be assessed against the Jumonvilles for every day this work has not been completed.

4 months from the date the permit is granted --- All work delinated in the consent judgment dated February 22, 1996 that was to be complete by August 31, 1996 must be completed.

*** A one hundred dollar ($100.00) per day fine (5 day work week excluding holidays) will be assessed against the Jumonvilles for every day this work has not been completed.

All

PHASE II

4 months from March 15, 1997 (or any date prior to) All interior work originally required completed by the consent judgment of February 22, 1996 including:

1) plumbing sewer lines shall be installed and "stubbed in" to final connection points with the home;

2) electrical wire installations shall be pulled and connected to outlets;

3) heating and cooling systems shall be installed and connected.

Any breach of these time periods will be considered a contempt of this Court order.

A12

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant is to bear all court costs for this proceeding.

JUDGMENT READ, RENDERED AND SIGNED at Gretna, Louisiana, this 23 day of OCTOBER, 1996.

/s/
JUDGE

A TRUE COPY OF THE
ORIGINAL ON FILE IN THIS
OFFICE.

/s/
DEPUTY CLERK
24TH JUDICIAL DISTRICT COURT
Parish of Jefferson, LA.

A13-1

24TH JUDICIAL DISTRICT COURT FOR THE

PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 481-536 DIVISION "I"

CITY OF KENNER

VERSUS

JAN P. JUMONVILLE, ET AL

FILED: January 23, 1997 /s/P Romaguera
DEPUTY CLERK

JUDGMENT AND REASONS

This matter came for hearing on January 21, 1997 on plaintiff's Motion for Contempt. This matter was taken under advisement by the Court.

PRESENT:

Kurt C. Garcia and James Maxwell, attorneys for plaintiff, City of Kenner;

Patrick F. Lee and Jan Jumonville, attorneys for defendants;

A13-2

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff's Motion for Contempt is **GRANTED.**

This Court finds that the plaintiffs are in contempt of the Judgment signed by this Court on October 23, 1996.

This Court made two things very clear to all parties in this case: 1) Get this house complete; and 2) **Cooperate!**

Yet, after listening to all the testimony, it is clear to this Court that little has occurred since October 23, 1996. it is obvious to this Court that the City of Kenner has gone to great lengths to comply with this Court's order. The defendant's architect, Peter Waring, testified that he had never seen a government body work so hard to cooperate as the City of Kenner. Kenner, was able to meet the deadline set forth by this Court in the October 23, 1996 judgment and award a permit for the

foundation only on November 15, 1996. Unfortunately however, the Jumonvilles made little to no effort to diligently use this permit to get the foundation completed.

Under this Court's judgment of October 23, 1996,

> Phase I - plans are to be submitted to the City of Kenner and Kenner is to issue a foundation permit only, on or before November 15, 1996

On December 30, 1996, the city of Kenner filed this Rule for contempt citing that the foundation work is still not complete. To the date of this hearing, the pilings are on the property but not in the ground. This work should have been completed by December 15, 1996.

Mr. Jumonville testified that he was unable to locate the type of pilings he desired, for the price he could afford. He was able to name only three suppliers that he had contacted. It is quite

evident to this Court that there is very little effort or cooperation on the part of the Jumonvilles. Never once did the Jumonvilles approach the City of Kenner to attempt to get an extension or to explain the problem they were having. They blindly ignored this Court's judgment of October 23, 1996.

The City of Kenner further cites that the Jumonvilles are in contempt of this court's prior judgment because they have failed to submit appropriate plans by the November 1, 1996 deadline.

The Jumonvilles insisted to their architect, Mr. Waring, that they wanted a third floor. Mr. Waring testified he told the Jumonvilles often that this was a problem but his clients demanded that the attic be planned as specified (see Exhibit P-4) i.e. including spaces which require windows, doors and special egress.

The Jumonvilles wee again made aware of the problems of a third floor build out via a conversation between Mr. Mayeux and Ms. Jumonville. Their architect was also made aware of the problems created by a third floor by a letter from Mr. Mayeux (see Exhibit P-2).

Yet on November 7, 1996, Jan Jumonville wrote to the architect requesting no revisions of the plans. **Where is the cooperation from the Jumonville's?**

On November 15, 1996, Jan Jumonville wrote to Keith Chiro changing the "label" of the room on the third floor from den to that of attic, but she includes in this letter that this room later may become a "rec. room". She expects this to be sufficient notice to change the plans all in accordance with the requirements of the City of Kenner.

She does <u>not</u> copy her architect with

this letter (see Exhibit D-1). Mr. Waring had already told the Jumonvilles that the plans were not "permitable" (see Exhibit P-5-A).

Ms. Jumonville attempts to fault the City of Kenner for not advising her that her letter of November 15, 1996 was not sufficient to change the certified plans.

This Court must make three observations in this regard.

1) All of this information had been communicated to their architect by the City of Kenner and their architect had communicated to the Jumonvilles that the third floor build out was a problem.

2) Can the Jumonvilles be so naive as to believe that their correspondence without their architect's intervention would be sufficient to alter plans which the City of Kenner, not only required, but also required be certified by an architect? Surely not.

3) There was no permit forthcoming. Why didn't the Jumonvilles make an inquiry? It is their home; they are under an order by this Court to cooperate, to move to get this house completed.

The Jumonvilles take all of this far

too lightly. There are neighbors living near this incomplete building who need to have some peace in their homes.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED for all of these above reasons, this Court finds the Jumonvilles in contempt of this court's order of October 23, 1996 for failure to have the foundation complete by December 15, 1996 and further for failure to have acceptable plans in a final form to the City of Kenner by November 1, 1996.

This Court does not want to financially jeopardize this building and therefore, fines the Jumonvilles fifty dollars ($50.00) per day beginning from December 30, 1996, the date of the filing of the petition. This fine will continue per diem as per the October 23, 1996 judgment until **both** of the following occur:

1) "All structural work including all pilings are completed" and;

2) "All plans are submitted in final form to the City of Kenner without variances and with the appropriate changes in the third floor plans made and certified by an architect".

JUDGMENT READ, RENDERED AND SIGNED

at Gretna, Louisiana, this 23rd day of

January, 1997.

/s/JoEllen Grant
JoEllen Grant
Judge

A TRUE COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE.

/s/P. Romaguera
P. Romaguera
Deputy Clerk

A 20

TWENTY-FOURTH JUDICIAL DISTRIT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 481-536 DIVISION "I"

CITY OF KENNER

VERSUS

JAN P. JUMONVILLE, ET AL

FILED:_____ DEPUTY CLERK_____

JUDGMENT

This matter came for hearing on the 23rd day of may, 1997.

Present:

KURT C. GARCIA and JAMES D. MAXWELL, attorneys for the City of Kenner, and, JAN P. JUMONVILLE, attorney for herself and Placide J. Jumonville.

In consideration of the pleadings, the testimony and evident presented at the hearing and the law,

IT IS ORDERED, ADJUDGED AND DECREED that the defendants, Jan P. Jumonville and Placide J. Jumonville, are in contempt of this court's orders of February 22, 1996, October 23, 1996, and January 23, 1997.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants, Jan P. Jumonville and Placide J. Jumonville, be fined Fifty & 00/100 ($50.00) Dollards per day beginning from March 17, 1997, the date of the filing of the City of Kenner's third Rule for Contempt. This fine will continue per diem as per the Octoer 23, 1996 Judgment and January 21, 1997 Judgment until the Jumonvilles complete the work on their home in accordance with the Consent Judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants, Jan P.

Jumonville and Placdie J. Jumonville, pay their fines by June 20, 1997, by 1:30 in the afternoon. This court determines the amount of the fines to be Nine Thousand Fifty & 00/100 ($9,050.00) Dollars.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all parties in this matter reconvene on June 13, 1997, to determine possible jail sentences to be given to the defendants in this matter.

JUDGMENT RENDERED on May 23, 1997.

JUDGMENT READ AND SIGNED this _____ day of June, 2, 1997, at Gretna, Louisiana.

HONORABLE JO ELLEN GRANT

A23

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

CITY OF KENNER NO. 481-536

VS.

PLACIDE J. JUMONVILLE
AND JAN P. JUMONVILLE DIVISION "I"

Court's ruling taken in the abov numbered and entitled cause in open Court at Gretna Louisiana, on May 23, 1997, before the Honorabl JoEllen Grant, Judge presiding.

APPEARANCES:

For the Plaintiff:

James D. Maxwell

Kurt C. Garcia

For the Defendants:

Jan P. Jumonville

PROCEEDINGS

THE COURT:

Okay, I have quickly reviewed the evidence. I keep hoping, each time we deal with this case, that I won't have to deal with it again. I deal with it again and again, and still nothing happens. I have walked a real fine line about fines, because my concern has been that, if I fine the Jumonvilles, they won't have any money to complete the house. Well, that hasn't worked. I find the Jumonvilles in contempt of this Court's orders; of the October order, of the January order, of literally every order that this Court has--has propounded. I am going to maintain the original fifty dollars a day fine, from whatever date that was until continuing, till it's done. I'm going to add, from the date this one was filed, I' going to add another fifty dollars a day for every work day that the plans...whatever my January--there were

two things, that pilings be done, and I think plans, both had to be done; they're not, that's continuing. All structural work, including all pilings, are completed, and, all plans are submitted in final form to the City of Kenner without variances and with the appropriate changes in the third-floor plans made and certified by an architect. Those

continue. I have run a tape on the expenses that these people have paid. I only ran the tape since--the first check, I believe, was 6028, which was January 24th, which was the first one after my January 21st ruling. That tape is a little over four thousand dollars, which tells this Court that expenses of one thousand dollars a month has been spent o

building this house. At this rate, this house will never be finished, at a thousand dollars a month. If that's all you've got, people, you better look to do something else, because this house isn't it. You cannot spend just one thousand dollars a month and expect a house to be done. Since January 21st, a whole house could have been built, and the biggest--the proudest thing that you have is the scaffolding around it. You know, literally nothing else has been done. The pilings have been done. They sat in the driveway from January until May--or they sat wherever they sat. Mr. Jumonville, you said you didn't willfully not complete this, but you sure have ignored every order this Court has done. You're going to have to scale down. You're going to have to do something, because these neighbors need a finished house. I have told that to you over and over and over again, and you completely ignore what I

say. Those fines that I have imposed, and I'm going to let Mr. Garcia figure out what they are, are to be paid by June 13th at nine o'clock in the morning, and I'm going to hold this hearing open until that time, and at that time I'm going to make a determination, and I'm going to consider three things: I'm going to consider whether to put the Jumonvilles in jail, I'm going to consider whether or not to put them on house arrest in their own home, or I'm going to consider whether to put them on house arrest at 50 Granada; and it will depend upon what you can bring to me on that morning and show me--actually, I'm going to do it at one thirty in the afternoon. It's going to depend upon what you can show me that you have done between now and then that's going to make my decision. And please know that if that money's not in the registry of the Court, you will go to jail--every nickel.

THE CLERK:

A28

You want that paid by nine, though?

THE COURT:

No, I want that paid by one thirty. I've changed it. I forgot. I've got criminal motions that morning.

THE CLERK:

Okay.

THE COURT:

The fines will continue until they're

paid, and they will continue until the things that are done that this Court has previously required to be done. And if you have to put all your money in fines, then each fifty dollars you put in fine is another day that this house doesn't get done; but it has to get done, and I don't care how it gets done, it will get done so that it fits the neighborhood. It may not fit your plans and your dream home, but you have wasted nine years, ten years, and we're all going to be old by the time it

gets finished, and I can't allow that to happen. You have ignored everything this Court has done, so I've got to do something even firmer than I've done before, because it's just not being accomplished. Please trust me when I say that you'll either go to jail or you'll be under house arrest. You have got to, Mr. Jumonville, you have got to put somebody else in charge of this--not you. From what I can tell, you don't get along with people, and they quit, they leave, they're gone, because you probably are too demanding. You have got to get your finger out of this pot. You've got to hire somebody that will do it for you. And you can't spend forever looking for that special someone who's going to do it the way you want it done, because there is nobody out there like that. I look at

those pictures today and I'm absolutely amazed. There's nothing new on that house that's significant, other than the scaffolding sitting around it. These people deserve to have a nice neighborhood. They've bought homes in a nice neighborhood. They expect to live in a nice neighborhood, without trash looking like that next door to them, or across the street from them, or down the street from them. I mean, that's going to attract things that just shouldn't be attracted to that kind of a neighborhood. Please listen to me this time; you haven't yet. I am dead serious. If you haven't done what I expect you to do, better find somebody to take care of your kids and bring your toothbrush, because you haven't listened to anything I've said yet, and I'm giving you three weeks, I guess it is to come up with what you need to come up with; and I'm sorry if it makes you scale down your house--you have got to admit that's what you have to do anyway. That

has to be done. This house could have been built twenty times over, and you can't just expend a thousand dollars a month and expect it to be built the way you expect it to be built. And, in fact, you're going to have to spend a lot more than that to get it built in the fashion it's going to have to be built. And if

you don't have the money, then now's the time to realize it and get out and get something done. Sell something, do whatever you need to do, because a thousand dollars a month isn't going to cut it, and that's all you've spent. I ran a tape since January 24th until--all of those things that you gave me. It's a little bit over four thousand dollars. That's a thousand dollars a month. It's not going to get done, ever. Mr. Jumonville--I mean, Mr. Garcia, if you'll

prepare a judgment to the effect that I have just ruled, and if you need any help, my staff will assist you with that help.

MS. JUMONVILLE:

Your Honor--

THE COURT:

I want every--I want everybody back here at one thirty on June 13th, and I'll make a determination as to what will be done with regard--and please let me make it very clear, Jumonvilles, it depends upon what you do, in addition to putting the money in the registry of the Court. It depends upon what you do--not you will, you will, you will, but you--it will be done, done, done, as to what I will do with the contempt part of this, whether you go to jail, whether you, you know, what will happen, and I've already spelled that out. So it's going to be up to you.

The burden is upon you to convince me not to put you in jail, because, as things stand right now, that's where you're going.

MS. JUMONVILLE:

Your Honor, I'd like to request that I be provided with whatever calculations are that will be submitted to the Court.

THE COURT:

Okay. Mr. Garcia, I'm sure, will run those by you. It's--it's work days, fifty dollars a day from the original one, which I had already put; and then from the time his is filed, and continuing, fifty--another fifty dollars a day. Get something accomplished this time, people. All right.

MS. JUMONVILLE:

Thank you, your Honor.

MR. GARCIA:

Thank you, your Honor.

(End of requested portion)

C E R T I F I C A T E

I, PATRICIA L. LAROSE, Official Court Reporter, do hereby certify that the foregoing is a true and correct transcript of the proceedings heard in open Court at Gretna, Louisiana, on May 23, 1997, before the Honorable JoEllen Grant, Judge presiding, in matter Number 481-536, entitled, "City of Kenner versus Placide J. Jumonville and Jan P. Jumonville."

Patricia L. LaRose
Official Court Reporter
24th Judicial District Court
In and For the Parish of Jefferson
State of Louisiana

Filed with the Clerk of Court this

_____ day of_____, 1997.

_____
Patricia L. LaRose, OCR

A35

CITY OF KENNER 97-C-602

VERSUS COURT OF APPEAL

JAN P. JUMONVILLE, WIFE OF/PLACIDE J. JUMONVILLE FIFTH CIRCUIT

STATE OF LOUISIANA

ORDER

This writ application arises from the same litigation as the judgments now on appeal before this court in No.97-CA-125, City of Kenner v. Jumonville. Further, the ruling made the basis of this application results from and is dependent upon those earlier judgments.

Accordingly, IT IS ORDERED on the court's own motion that the above-numbered-and-titled application for supervisory writs be consolidated with case No.97-CA-125 c/w 97-C-210 on the docket of this court, for consideration by the panel assigned to the merits of that appeal. That case currently is set for hearing on August 7, 1997 at 10:00 a.m.

A36

The relators-appellants are granted until July 3, 1997 and the respondents-appellants are granted until July 17, 1997 to file additional briefs addressing the issues raised I this application.

IT IS FURTHER ORDERED that execution of the contempt judgment dated June 16, 1997 is STAYED pending further orders of this Court 6.

Gretna, Louisiana, this 20th day of June, 1997.

/s/Thomas C. Wicker, Jr.
Thomas C. Wicker, Jr.
Judge

/s/H. Charles Gaudin
Charles Gaudin
Judge

/s/Charles Grisbaum, Jr.
Charles Grisbaum, Jr.
Judge

A TRUE COPY
GRETNA JUN 20 1997
/s/Clerk
Court of Appeal,
Fifth Circuit

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701 So.2d 223
(Cite as: 97-125 (La.App. 5 Cir. 8/27/97), 701 So.2d 223)

The CITY OF KENNER
v.
Jan P. Jumonville, Wife of/and Placide JUMONVILLE.

Nos. 97-CA-125, 97-C-210, 97-C-602.

Court of Appeal of Louisiana,
Fifth Circuit.

Aug. 27, 1997.

Rehearing Denied Oct. 17, 1997.

Property owners were ordered by city to complete renovations on their home, and were twice found in contempt of trial court's judgment, in Judicial District Court, Parish of Jefferson, No. 481-536, Jo Ellen Grant, J. Property owners' appeal was consolidated with two applications for supervisory writs. The Court of Appeals, Daley, J., held that: (1) property owners did not make requisite showing that trial court's judgments of contempt were erroneous, and (2) fine for contempt of court should be lowered to $500, and payment should be made to District Court, not city.

Affirmed as amended; writ application denied.

[1] JUDGMENT k71.1
228k71.1

Consent judgment is bilateral contract between parties which gets its binding force from consent the parties gave, rather than from adjudication by courts.

[1] JUDGMENT k91
228k91
Consent judgment is bilateral contract between parties which gets its binding force from consent the parties gave, rather than from adjudication by courts.

[2] APPEAL AND ERROR k154(4)
30k154(4)
Party to consent judgment cannot directly appeal that judgment; party must first invalidate his consent.

[3] JUDGMENT k72
228k72
Six-month deadlines for completion of home renovations in consent judgment were not arbitrary; they were agreed to by both property owners and city and property owners could not point to any legally supportable reason why their consent to judgment should be vitiated.

[4] CONTRACTS k1
95k1
Court cannot undermine contract simply because it was a bad deal, or is believed to be, for one of the parties.

[5] CONTEMPT k28(1)
93k28(1)
Fact that compliance with contract or agreement may be more expensive than originally anticipated is no defense to contempt charge for violating consent judgment.

[6] JUDGMENT k72

228k72
Deadlines for completion of home renovations in consent judgment were not arbitrary or abuse of police power where city had interest in seeing that property owners' residential construction was completed in timely fashion, and for safety of community where the construction was located.

[6] MUNICIPAL CORPORATIONS k601.3
268k601.3
Deadlines for completion of home renovations in consent judgment were not arbitrary or abuse of police power where city had interest in seeing that property owners' residential construction was completed in timely fashion, and for safety of community where the construction was located.

[7] JUDGMENT k72
228k72
No proof was necessary to support city's claim of safety violation and nuisance due to property owners' delay in renovating home, since property owners and city agreed to consent judgment establishing deadlines for property owners' completion of repair and remodelling work on their home.

[8] CONSTITUTIONAL LAW k46(2)
92k46(2)
Ordinarily, unconstitutionality of statute must be presented first to the trial court and must be specially pleaded with particularity.

[8] CONSTITUTIONAL LAW k46(3)
92k46(3)
Ordinarily, unconstitutionality of statute must be presented first to the trial court and must be specially pleaded with particularity.

[9] CONSTITUTIONAL LAW k43(1)
92k43(1)
By entering into consent judgment establishing deadlines for completion of renovations on their home, property owners waived constitutional defenses based on due process and equal protection rights under state and federal constitutions. U.S.C.A. Const.Amends. 5, 14.

[10] CONTEMPT k20
93k20
Wilful disobedience of any lawful judgment or order of the court constitutes constructive contempt of court.

[11] CONTEMPT k20
93k20
To find person guilty of constructive contempt, it is necessary to find that he or she violated order of court intentionally, knowingly and purposefully, without justifiable excuse.

[12] CONTEMPT k39
93k39
In making determination of constructive contempt, the trial court is vested with great discretion.

[13] CONTEMPT k60(3)
93k60(3)
Evidence of property owners' wilful noncompliance with terms of consent judgment establishing deadlines for completion of renovations to their home, supported finding of constructive contempt: structural engineer was not hired until days before deadline for exterior work on house; property owners made many changes in remodelling plans, necessitating long delays and construction difficulties; piling permit was not applied for until ten days before deadline in consent judgment, and

court was not vindicated and penalty only benefited city.

[18] CONTEMPT k60(3)
93k60(3)
Property owners' argument that contempt sanctions should have been awarded against city because city's petition was unsupported by law, ordinance or building code, was supported by no evidence in property owners' petition. LSA-C.C.P. art. 863.

[19] CONTEMPT k66(7)
93k66(7)
Property owners appealing judgment of contempt for willful violation of consent judgment did not make sufficient showing that trial court erred in its findings, where review of judge's written reasons strongly showed that trial court carefully considered evidence and testimony before her.

[20] CONTEMPT k66(6)
93k66(6)
Omission of copy of motion for contempt and other responsive pleadings from property owners' writ application or supplemental memorandum seeking review of judgment of contempt was fatal to appellate court's ability to consider application. Uniform Rules, Courts of Appeal, Rule 4-5(h), 8 LSA-R.S.

[21] CONTEMPT k75
93k75
Fines totalling $9,050 calculated on basis of $50 per day for five day work week for property owners' noncompletion of home as specified in consent judgment, where each $50 per day fine represented separate act of contempt, did not violate statute specifying that no single act of contempt shall be fined more than $500; nothing in statute prohibited accrual of

fines for separate acts of contempt.

[22] CONTEMPT k74
93k74
The law clearly recognizes validity of judgments that assess per day contempt fine for noncompliance.

[23] CONTEMPT k66(6)
93k66(6)
Property owners' claim that contempt fines were punitive in nature and must be set aside because they were not afforded Constitutional protections was groundless since their brief did not specify what Constitutional protections they were denied, and prior to each judgment of contempt property owners were present in open court for hearing with counsel present, with ability to present evidence and witnesses, and to cross examine witnesses. LSA-C.C.P. art. 225.

[24] CONTEMPT k40
93k40
It is only after criminal sentence has been imposed in contempt proceeding, ancillary to civil proceeding, that proceeding assumes quality of criminal or quasi-criminal proceeding.

[25] CONTEMPT k74
93k74
Property owners' contempt fines were remedial in nature, because if property owners finished their house according to deadlines in consent judgment, fines would either not have accrued or would have stopped accruing.

[26] APPEAL AND ERROR k837(10)
30k837(10)
Court of appeals is prohibited from considering

evidence not presented to the trial court. LSA-C.C.P. art. 2164.

[27] CONTEMPT k66(6)
93k66(6)
Without transcript and knowledge of what evidence judge reviewed in contempt proceedings against property owners in violation of consent judgment for failing to complete construction of their home, the Court of Appeals was unable to say that trial court erred in its determinations; trial judge's statement that photographs of property owners' house reflected only new scaffolding and not new work on the home was convincing.

[28] JUDGES k39
227k39
Property owners were found to have committed acts of constructive contempt of court, not direct contempt, thus their argument that next hearing in trial court must be conducted by different judge is misplaced; law does not require that hearings on constructive contempt be held before different judge than the one whose judgment or order was disobeyed.

[29] JUDGES k49(1)
227k49(1)
Unfavorable ruling, even several, is not evidence of trial judge's bias against party so as to require disqualification.

****226** Jan P. Jumonville, Patrick F. Lee, Metairie, for Defendants/Appellants.

James D. Maxwell, Kurt C. Garcia, Glenn B. Ansardi, Kenner, for Plaintiff/Appellee.

Before CANNELLA and DALEY, JJ. and ROBERT J.

BURNS, J. Pro Tem.

*2 DALEY, Judge.

This appeal concerns a trial court judgment dated October 23, 1996, which required the defendants, Jan P. and Placide Jumonville, to complete renovations on their home. The appeal has been consolidated with two Applications for Supervisory Writs filed by defendants after the trial court found them twice in contempt of the trial court's judgment. Defendants appeal the trial court's judgment, arguing several assignments of error. They also seek this court's supervisory review of the two contempt judgments.

We amend and affirm the trial court's judgment of October 23, 1996. We deny the Jumonvilles' two Applications for Supervisory Writs.

Facts

On or about August 6, 1993, the City of Kenner issued a building permit to Placide Jumonville for interior and exterior renovation work at his home at municipal *3 address, 50 Granada Drive, Kenner, Louisiana. [FN1] On April 18, 1995, the City of Kenner filed a Petition for Preliminary and Permanent Injunction against defendants in First Parish Court. On or about July 27, 1995, the First Parish Court ordered the matter transferred to the 24th Judicial District Court. The petition alleged numerous violations of City Ordinance 1427, specifically Section 5-84, allegedly not prosecuting the renovations in accordance with the building permit issued to the Jumonvilles. The petition also alleges that the structure was a nuisance. The petition sought to enjoin the Jumonvilles from further violations by requiring them to complete their

renovations by certain deadlines. The Jumonvilles filed an Answer, Reconventional Demand, and Third Party Demand.

> FN1. The record shows that the Jumonvilles purchased the home in December of 1987.

On February 22, 1996, the Jumonvilles and the City of Kenner signed a Consent Judgment, which set up schedules by which the renovations would proceed and also established deadlines when certain phases would be completed. This judgment was signed and rendered by the Court. According to the judgment, certain specific exterior work was to be completed by August 31, 1996, and certain interior work was to be completed by February 28, 1997.

On August 9, 1996, the Jumonvilles filed a Motion to Modify Consent Judgment, alleging that their structural engineer's report (rendered August 5, 1996) indicated that foundation pilings were necessary and that this problem, with others, would prevent the exterior work from being completed by the August 31, 1996, deadline. The petition further noted that framing errors had been discovered, inferior framers had been fired, a suitable framer could not be found, and weather problems had further delayed the renovations. They asked that all deadlines be extended 90 days.

***4** In response, the City filed a Motion to Modify Consent Judgment, arguing that defendants had had ample time to complete their home, and asked that the Consent Judgment be modified to include, for noncompliance, a penalty of contempt of court and a fine of $1000 per week of noncompliance. Both motions came for hearing on October 4 and 17, 1996.

Kenner's Memorandum in Support of their motion alleged that the Jumonvilles purchased the property on December 14, 1987, and have been engaged in ongoing renovations since that time. Alleging that defendants unreasonably delayed the work, **227 Kenner filed their Petition for Preliminary Injunction, claiming that the defendants violated their building permit, maintained an unsafe building, and that the building failed to meet minimum housing standards set by the City of Kenner Code of Ordinances, specifically the Kenner Building Regulations, and that the unfinished building was a nuisance.

Prior to the hearings on the Motions to Modify, on September 3, 1996, Kenner filed a Rule for Contempt of Court against defendants based upon the passage of the August 31, 1996, deadline without completion of the exterior work. This rule was set to be heard with the other motions.

After the hearing on October 4 and 17, on October 18, 1996, the court rendered judgment granting Kenner's Motion for Contempt and granted in part defendants' Motion to Modify Consent Judgment. An amended judgment was rendered on October 23, 1996, correcting typographical errors in the October 18, 1996 judgment. [FN2] The court found that the defendants were in contempt of the February 22, 1996 Consent Judgment, in that they had failed without just cause to timely complete the work at 50 Granada Drive in accordance with the Consent Judgment. The court *5 ordered defendants to pay Kenner $1000 in penalties by October 31, 1996. This judgment further established detailed phase schedules and new deadlines for the renovations, and established specific penalties for the defendants' failure to comply therewith.

FN2. For simplicity, we refer only to the October 23, 1996 judgment, because the latter judgment made no substantive changes in the October 18, 1996 judgment.

The Jumonvilles appealed the October 23, 1996 judgment. On appeal, they assign the following errors of the trial court.

1. The trial court erred in ordering the Jumonvilles to complete the renovation of their home under arbitrary deadlines, when there exists no city or state law setting forth any deadlines whatsoever within which to complete renovations, and holding them in contempt with future penalties when there is no law whatsoever to support such an order.
2. The trial judge violated the Jumonvilles' constitutional rights guaranteed under the Louisiana Constitution and Constitution of the United States, under the 14th Amendment in violation of due process and equal protection under the laws of the State and the United States and denied the Jumonvilles' peaceable possession of their property.
3. The trial judge erred in holding the Jumonvilles in contempt for not completing construction by a deadline when there was no evidence whatsoever of wilful noncompliance.
4. The trial judge erred in not finding the City in contempt and in violation of Article 863 and the Jumonvilles should have been awarded attorney fees and all cost [sic].

In subsequent proceedings, the City of Kenner filed a second Motion for Contempt on December 30, 1996, which was heard on January 21, 1997. The trial court rendered judgment on January 23, 1997, finding defendants in contempt of the court's October 23, 1996 judgment and the February 22, 1996 Consent

Judgment, and ordering the payment of fines as per that judgment. Defendants have filed Writ No. 97-C-210, asking this court to review that judgment.

*6 Writ No. 97-C-602 concerns a June 16, 1997 trial court judgment, finding defendants in contempt of the October 23, 1996 judgment, for further noncompliance therewith.

First Assignment of Error--Arbitrary Deadlines

In their first assignment of error, the Jumonvilles complain that the October 23, 1996 judgment sets arbitrary deadlines for the completion of their home, and penalties for noncompliance with the schedule, without legal authority.

[1][2] The October 23, 1996 judgment stems from the February 22, 1996 Consent Judgment between the parties, which set deadlines on various stages of the renovations. A consent judgment is in effect a bilateral contract between the parties which gets its binding force from the consent the **228 parties gave, rather than from adjudication by the courts. Ortego v. State, Dept. of Transp. & Development, 95-830 (La.App. 3 Cir. 4/24/96), 673 So.2d 1168, rev'd on other grounds, 689 So.2d 1358 (La.1997). A party to a consent judgment cannot directly appeal that judgment; the party must first invalidate his consent. Hartwig Moss Ins. Agency, Ltd. v. Kelly, 96-1423 (La.App. 4 Cir. 1/29/97), 688 So.2d 196.

In this appeal of the October 23, 1996 judgment, defendants indirectly put at issue the validity of their consent to the Consent Judgment. Mr. Jumonville argued that he is inexperienced as a builder and did not take into account other delays such as weather,

availability of workmen, etc. He argues that these factors controlled his ability to complete the work in a timely manner.

The Jumonvilles also cite the late discovery, in April or May, 1996, of pilings under the structure that were incorrectly placed. The record shows that it was not until August, days before the consent judgment's deadline, that a structural engineer *7 was called to inspect the foundation. The Jumonvilles also argue that many of their improvements exceed code requirements and are more time consuming to install.

[3] After a review of the entire record, we conclude that the deadlines in the Consent Judgment were not arbitrary; they were agreed to by both the Jumonvilles and the City of Kenner. The defendants cannot point to any legally supportable reason why their consent to the judgment should be vitiated. Mr. Jumonville pleads inexperience in building, however, the record shows that a building permit was issued in 1993, construction has been ongoing (though sporadically) since at least 1988, and all during these years Mr. Jumonville acted as the general contractor. The Jumonvilles allege that in February, they did not know of the problems with the pilings; however, they did not call the first structural engineer to investigate the foundation until July. They had previously agreed that exterior structural work was to be completed by August 31, 1996. The trial court reasonably concluded that the Jumonvilles were not acting with due diligence to attempt to meet the deadline they had agreed to.

[4][5] Furthermore, the record shows that Mrs. Jumonville is a practicing attorney, and as such is presumed to know the legal consequences of a Consent Judgment. The court cannot undermine a

contract simply because it was a bad deal, or is believed to be, for one of the parties. [FN3] Martin Forest Products v. Grantadams, 616 So.2d 251 (La.App. 2 Cir.1993). Likewise, the fact that compliance with a contract or agreement may be more expensive than originally anticipated is no defense. Id. The Jumonvilles argue that no law supports the creation of these deadlines, but we find that these deadlines are in fact supported by the general law of contracts.

> FN3. This court specifically does not address the issue of whether the consent judgment was a "bad deal" for the Jumonvilles.

*8 In their Motion to Modify Consent Judgment, the Jumonvilles asked for a 90 day extension of all deadlines in the Consent Judgment. The trial court's October 23, 1996 judgment grants deadlines more generous than asked for by the Jumonvilles in their Motion to Modify. In setting these deadlines, the court considered the testimony of the Jumonvilles, input from both parties' attorneys, and testimony from the defendants' expert witnesses. The defendants have failed to show that the deadlines in either the Consent Judgment or the October 23, 1996 judgment are arbitrary or unsupported by law. They have also failed to vitiate their consent to the Consent Judgment.

[6][7] The Jumonvilles also argue that the deadlines set by the court constitute an abuse of police power by the City of Kenner. They argue: "The court's judgment of arbitrary deadlines does not promote a valid or legitimate objective of a municipality that prevents some offense or manifest evil or preserves the public health, safety, morals or general welfare and should be reversed." We disagree. We find that the deadlines are not arbitrary. The City of Kenner has an **229

interest in seeing that residential construction is completed in a timely fashion, for the safety of the community where the construction is located. The record shows that this house has been under construction since 1988. Kenner's pleading alleges that the neighbors have voiced concerns over safety issues and that the structure constituted a nuisance to the surrounding community. Mr. and Mrs. Jumonville correctly point out that no evidence was introduced to support the City of Kenner's claim of safety violation and/or nuisance, but the Jumonvilles ignore the fact that no proof was necessary since the parties agreed to a Consent Judgment. This court will not require the City of Kenner to prove facts which the Jumonvilles tacitly accepted by entering into the Consent Judgment.

*9 Finally, the Jumonvilles did not argue abuse of police power to the trial court, especially prior to signing the Consent Judgment. Their agreement to deadlines in the Consent Judgment implicitly waives their objections to Kenner's suit. The Jumonvilles then asked for an extension to the construction deadlines. We find no abuse of the police power in the parties' and the court's establishment of new deadlines in the October 23, 1996 judgment to complete the construction.

Second Assignment of Error--Constitutional Issues

The Jumonvilles argue that the judgment of October 23, 1996 is in violation of their state and federal constitutional rights and violates due process and equal protection rights under both constitutions. They argue that the establishment of construction deadlines is an unconstitutional exercise of police power by the City of Kenner. They also argue that the building codes and ordinances relied upon by Kenner are unconstitutional.

[8] Defendants pled these constitutional issues in their Reconventional and Third Party Demand, prior to the signing of the Consent Judgment; however, these issues were not argued before the trial court, nor briefed. Defendants did not produce any evidence on this issue. Ordinarily, the unconstitutionality of a statute must be presented first to the trial court and must be specially pleaded with particularity. Vallo v. Gayle Oil Co., Inc., 94-1238 (La.11/30/94), 646 So.2d 859.

[9] Moreover, we find that by entering into the Consent Judgment, defendants have waived these constitutional defenses. Defendants pled these constitutional defenses in their Answer, Reconventional Demand, and Third Party Demand, filed in June, 1995. The Consent Judgment was signed and entered into the record on February 22, 1996. The Consent Judgment has the effect of compromising the parties' differences. ***10** The Jumonvilles cannot now resurrect these constitutional defenses in response to the City of Kenner's Motion for Contempt.

Third Assignment of Error--Contempt

Next, the Jumonvilles argue that the judge erred in finding them in contempt of the Consent Judgment, when there was no evidence of wilful noncompliance.

[10] The wilful disobedience of any lawful judgment or order of the court constitutes a constructive contempt of court. Contempt proceedings in civil cases are regulated by LSA-C.C.P. art. 221-227 and LSA-R.S. 13:4611. LSA-C.C.P. art. 224 provides in pertinent part:

> A constructive contempt of court is any contempt other than a direct one. Any of the following acts constitute a constructive contempt of court:

* * * * * *

(2) Wilful disobedience of any lawful judgment, order, mandate, writ, or process of the court;

LSA-C.C.P. art. 227 provides:

A person may not be adjudged guilty of a contempt of court except for misconduct defined as such, or made punishable as such, expressly by law.

The punishment which a court may impose upon a person adjudged of contempt of court is provided in La.R.S. 13:4611.

LSA-R.S. 13:4611 provides in pertinent part:

Except as otherwise provided by law:

(1) The supreme court, the courts of appeal, the district courts, family courts, juvenile ****230** courts and the city courts may punish a person adjudged guilty of contempt of court therein, as follows:

* * * * * *

(d) For any other contempt of court, including disobeying an order for the payment of child support or alimony or an order for the right of ***11** visitation, by a fine of not more than five hundred dollars, or imprisonment for not more than three months, or both.

[11][12] To find a person guilty of constructive contempt, it is necessary to find that he or she violated the order of court intentionally, knowingly and purposefully, without justifiable excuse. In making this determination, the trial court is vested with great discretion. Reeves v. Thompson, 95-0321 (La.App. 4 Cir. 12/11/96), 685 So.2d 575.

[13] The contempt judgment on appeal was rendered on October 23, 1996. The trial court found that the Jumonvilles had exhibited wilful noncompliance with the

terms of the February 22, 1996 Consent Judgment. The court based its findings upon testimony by Mr. Jumonville, his witnesses, and documentary evidence.

The record shows that the Jumonvilles discovered the foundation problems around late April or early May, 1996. These problems consisted of the discovery that portions of the slab were not supported by pilings, and in some cases the pilings were found outside of the slab's perimeter, away from the grade beams. The Jumonvilles did not call the first structural engineer, Mr. Hall, until around July 1. The structural engineer who testified, Mr. Carubba, was not hired until early August, 1996, within days of the deadline for the exterior work. Mr. Jumonville admitted that the home has been under construction since late 1987 and early 1988, and that since that time until the present it is not habitable. He further admitted that he has acted as his own contractor and has had great trouble finding workers who met his standards. He also admitted that the plans have been altered and that the Jumonvilles desired many changes, such as different brick, that have necessitated extra time in preparation and installation.

The record shows that Mr. Neil Hall, his first structural engineer, visited the property around July 1, 1996, and found no evidence of distress in the slab or other slab failure.

***12** Mr. Jumonville engaged an architect on or about August 21, 1996. Mr. Roy Carubba, a structural engineer who testified as an expert for the Jumonvilles on October 17, 1996, stated that he first inspected the property around September 6, 1996. He stated that the property is around 23 years old and that the soil subsidence found there is common to the area, and was probably in existence for several years, evidenced

by standing water. Mr. Carubba stated that the slab was sufficient for the current structure, but that the Jumonvilles' changes (the heavier brick and the increased studs, for example) would necessitate the new pilings. He did not see any signs in the slab that it had been inadequate for the past 23 years. He opined that driving the new piles should require around thirty days work.

Mr. Peter Waring, the architect, testified next. He stated that he engaged Mr. Carubba because of conditions at the house that gave him concern, such as the soil subsidence. He testified that they were presently working through the final design working drawings. Waring stated that the plans called for a roof system that is approximately five times as heavy as a standard GAF seal tab shingle roof. He agreed with the previous testimony and reports that the slab showed no structural failures, but also agreed that the position of piles outside the grade beam was not acceptable and should be corrected by driving new piles in the correct locations. Waring testified that the piling plan submitted by the Jumonvilles to Kenner was not stamped by an architect or an engineer. On redirect, Waring said that the piling and outside veneer of the home could be completed in approximately three to four months if pursued in a very aggressive way.

Jumonville blamed the rainy weather on his construction delays; however, he was not able to establish that the weather was unusually rainy for summer in New Orleans. He admitted that the Consent Judgment did not **231 consider weather delays. *13 Jumonville testified that he hired approximately five men as laborers or carpenters, and that he fired them all within the six month period covering the Consent Judgment. Jumonville applied for the piling permit on

August 21, 1996, just ten days before the expiration of the exterior work deadline, and testified that he knew then he would not be able to complete the work in ten days. Jumonville admitted that he did not call the City of Kenner to inquire about the permit until after the August 31, 1996 deadline.

During cross-examination of Mr. Jumonville, Kenner introduced a series of photographs of the property taken October 3, 1996, the day before the hearing in question. These photographs showed that the outside of the house was not finished, nor the roof. Neither windows nor doors were in place. (Windows were ordered, but not paid for.) Jumonville testified that most of the framing had been in place for several months, and sometimes longer. He stated when he signed the Consent Judgment, he knew that the construction would be heavier than "normal" construction and far above code standards.

At the time of his testimony, Mr. Jumonville did not have a piling plan, architectural drawings, or engineering design drawings or foundation studies from Mr. Carubba in writing.

[14] The above evidence and testimony were more than adequate for the trial court to find that defendants were in wilful noncompliance with the October 23, 1996 judgment, and the judgment of contempt is well supported. The trial court is in a superior position to the appellate court to observe the demeanor and credibility of witnesses, and absent manifest error, the trial court's conclusions should be upheld. The evidence as a whole shows that the construction and necessary alterations of the home were not prosecuted in a timely fashion. The Consent Judgment was signed on ***14** February 22, 1996. The first significant structural activity

appears to have taken place around July 1, with the hiring of Mr. Hall for a structural report, after the discovery of the misplaced pilings in late April or early May. Mr. Waring was not hired until August 21, 1996, and Mr. Carubba was not hired until September, past the deadline. Mr. Jumonville testified that the enhanced brick, roofing, and framing were part of his plans at least by the time of the Consent Judgment, but it appears that steps were not taken to address the slab concerns until July, four full months after the Consent Judgment and only 60 days before the August 31, 1996 deadline. Moreover, Carubba testified that soil subsidence was common in this area, and in his opinion, these conditions affecting the slab were known to the Jumonvilles significantly in advance of the Consent Judgment.

[15] However, we disagree with the portion of the October 23 judgment ordering the Jumonvilles to pay the City of Kenner $1000 in penalties. While the court's powers of punishment for contempt include fines, LSA-R.S. 13:4611, the judgment ordered the Jumonvilles to pay a "penalty" to the City of Kenner. The consent judgment contained no penalty clause. However, the record and judgment are clear that this "penalty" is a fine for finding the Jumonvilles in contempt of court. LSA-R.S. 13:4611(1)(c) and (d) limit the amount a court may fine a person for an act of constructive contempt to $500.

[16][17] The court also erred in making the fine payable to the City of Kenner. A contempt proceeding is designed for the vindication of the dignity of the court rather than for the benefit of a litigant. Nungesser v. Nungesser, 558 So.2d 695 (La.App. 1 Cir.1990). A penalty payable to the City of Kenner does not vindicate the court; it benefits the City of Kenner. For these

reasons, that portion of the judgment awarding the penalty is amended to reflect that this penalty is a fine, to reduce the *15 fine to $500, and to reflect that the fine is payable to the 24th Judicial District Court, not the City of Kenner.

Assignment of Error Four--Art. 863

The Jumonvilles argue that the City of Kenner should have been found in contempt, in violation of Art. 863, and the Jumonvilles should have been awarded attorneys fees and costs.

**232 [18] The Jumonvilles argue that art. 863 sanctions should be awarded because the City of Kenner's petition is unsupported by law, ordinance or building code, and they produced no evidence to support the allegations in the petition. Their argument here substantively mirrors their arguments on the first three assignments of error.

As reflected above, this court disagrees with the Jumonvilles' position and today affirms a judgment in favor of the City of Kenner. As such, we see no violation of LSA-C.C.P. art. 863.

Judgments of Contempt--Writ Applications

In Writ Application No. 97-C-210 [FN4], the Jumonvilles ask this court to reverse the trial court's judgment of January 23, 1997, which found them in contempt of the October 23, 1996 judgment and the Consent Judgment, ordered them to pay fines in accordance with that judgment, and set new deadlines for the completion of the construction. The trial court found the defendants in wilful noncompliance with the court's previous judgments.

FN4. The Jumonvilles filed both a Motion For Appeal and a Notice of Intent for a writ application regarding this judgment. The matter was presented to and accepted at this court as a writ application, although both parties sometimes refer to 97-C-210 as an appeal.

***16** It is important to note at this juncture that the appellate record's transcripts end with the transcription of the October 17, 1996 hearing. This Writ Application does not contain a transcript of the contempt hearing held on January 21, 1997, but does contain the trial judge's detailed Judgment and Reasons.

The Writ Application itself argues that the court had no basis for finding them in wilful non-compliance of the court's previous judgments. In the writ, the Jumonvilles allege that between September of 1994 and April 18, 1995, the chief of the Kenner Department of Inspection and Code Enforcement told them that a Kenner City Council member was applying political pressure to force the renovations to a finish because of complaints of constituents. The appellate record contains no information on this scenario, and thus we are unable to verify the substance of these allegations. However, we deem this information irrelevant to the application before us, as these alleged events took place prior to the signing of the Consent Judgment in February of 1996, and as such, are not relevant to the trial court's determination in January of 1997 that the Jumonvilles were in contempt of a judgment rendered in October of 1996.

The Jumonvilles argue that they were not issued a piling permit until November 15, 1996, which caused them to have to renegotiate piling prices the Jumonvilles obtained in August of 1996. Jumonville

alleged that the piling prices doubled between August and November, but we do not have any documentary proof of this claim.

The Jumonvilles also argue the same constitutional issues that they argued in the appeal; however, there has been no showing that these constitutional issues were first considered by the trial court. The trial court's written reasons for judgment give *17 us no indication that these issues were in fact argued. As such, these issues are not properly before us.

The Jumonvilles also argue that the court's judgments and orders are unsupported by any law whatsoever. However, they signed a Consent Judgment, which is a contract between them and the City of Kenner. As we said above, the law of contracts is the law that supports all subsequent court orders with deadlines that follow the Consent Judgment. The Jumonvilles agreed in the Consent Judgment to finish their home according to the deadlines. They have failed to show that the Consent Judgment is invalid in any way. The subsequent judgments have extended the deadlines at the request of the Jumonvilles.

[19] On the application as made, the Jumonvilles have not made a sufficient showing that the trial court erred in its findings. As relators, they bear the burden of proof. Our review of the judge's written reasons strongly shows that the trial court carefully considered the evidence and the testimony before her, but without a transcript and complete record of that hearing and the evidence introduced, the Jumonvilles have given us **233 nothing to review. Therefore, we decline to disturb the trial court's January 23,1997 judgment, which found the Jumonvilles in contempt of the court's judgments of February 22, 1996 and October 23, 1996.

Writ Application 97-C-602

The Jumonvilles filed this Writ Application (97-C-602) following the trial court's judgment of June 16, 1997, finding them in contempt of the February 22, 1996 and October 23, 1996 judgments. This court ordered the Writ Application consolidated with appeal 97-CA-125 and writ no. 97-C-210 for consideration. This court ordered a stay of all trial court proceedings pending the outcome of the *18 consolidated cases in this court, and allowed the parties to file supplemental briefs. No transcript of this contempt hearing appears in the record. A transcript of only the judge's ruling has been attached to the writ application.

[20] In this Writ Application, the Jumonvilles ask us to review the trial court's judgment of June 16, 1997, which granted the City of Kenner's Third Motion for Contempt. A copy of this Motion for Contempt is not included in the Writ Application, nor are any other responsive pleadings included in the Writ Application or the Supplemental Memorandum, as required by Uniform Rules of the Courts of Appeal, Rule 4-5(h). These omissions, along with the absence of the hearing's transcript, are fatal to our ability to consider the Jumonvilles' application.

This writ application raises two assignments of error: 1) LSA-R.S. 13:4611 unconstitutional and 2) the district court judge abused her discretion in ordering the payment of $ 9050.00 in excess of the maximum fines under LSA-R.S. 13:4611(1)(d) and the imprisonment of the Jumonvilles for failure to pay the excessive fine.

The Jumonvilles' supplemental brief raises additional assignments of error. They argue that the Rule to Show Cause Why the Jumonvilles Should Not be Imprisoned

fails to specifically, precisely and definitely inform the Jumonvilles what they must do to avoid imprisonment; that the evidence fails to show that the Jumonvilles are deliberately refusing to comply with the court's order; that the Jumonvilles were not afforded their constitutional protections applicable in "a civil contempt proceeding criminal in nature"; that imprisonment will prevent compliance with the court's order; that the judge ordered imprisonment at the 50 Granada address, which is uninhabitable; that the judge abused her discretion by including "rain days" as work days in her fine for contempt; and that any further contempt rule should be held before a different trial court judge.

***19** The Jumonvilles fail to present any evidence that the constitutionality of LSA-R.S. 13:4611 was argued before the trial court. No responsive pleadings are included in this Writ Application, and the transcript attached to the application does not indicate that the parties argued the constitutional issue before the trial court. Therefore, we do not address this issue. Vallo v. Gayle Oil Co., Inc., supra.

[21] The Jumonvilles argue that the fine of $9050 is excessive under LSA- R.S. 13:4611, which authorizes a maximum $500 fine. We disagree. The Jumonvilles' fines represent $50 per day of the home's noncompletion, as per the terms in the October 23, 1996 and January 23, 1997 judgments. Those judgments specifically state that the fines are per a five day work week and exclude legal holidays from the calculations. Each $50 per day fine is for a separate act of contempt of court. Implicit in the statute is that no single act of contempt shall be fined more than $500. The Jumonvilles' fines continue to accrue, because each day they do not finish their home is a separate and distinct act of contempt under the judgments. To

avoid the accrual of the fines, the Jumonvilles can either finish the home or convince the trial court that their failure to do so is not wilful or deliberate. The Jumonvilles have failed to do either one.

[22] Nothing in LSA-R.S. 13:4611 prohibits the accrual of fines for separate acts of contempt. We find that LSA-R.S. 13:4611 is not violated. The law in this state clearly recognizes the validity of judgments that assess a per day contempt fine for non-compliance. See Parish of Jefferson v. Muhammad, ****234** 96-572 (La.App. 5 Cir. 12/11/96), 686 So.2d 905.

We find the June 16, 1997 judgment is clear in setting forth what the Jumonvilles must to do to avoid future contempt proceedings: finish the renovations according to the deadlines set in the previous judgments. The trial court has also ***20** stated, several places in the record, that if the Jumonvilles feel that they cannot meet specific deadlines, they can and should apply to the court for an extension before the passing of the deadline, rather than wait until the deadline passes before they make the court aware of problems.

[23] The Jumonvilles claim that under this court's interpretation of LSA- R.S. 13:4611 in Champagne v. Champagne, 541 So.2d 933 (La.App. 5 Cir.1989), their fines are punitive in nature and, therefore, must be set aside as the Jumonvilles were not afforded "the Constitutional protections guaranteed them." However, their brief does not specify what Constitutional protections they were denied. Prior to each judgment of contempt, the Jumonvilles were present in open court for a hearing with counsel present, with the ability to present evidence and witnesses, and cross examine witnesses, as per LSA- C.C.P. art 225. Given these facts, we cannot see what constitutional protections

have been denied the Jumonvilles.

[24][25] Moreover, we disagree with defendants' interpretation of Champagne, supra. Clearly, the Jumonvilles' contempt is civil in nature. [FN5] The fines are remedial in nature, because the party, "can avoid paying the fine simply by performing the affirmative act required by the court's order," (Champagne, p. 936), i.e. complying with the deadlines in the court's previous orders.

> FN5. Here, the Jumonvilles argue that the trial court's mention of imprisonment made the proceeding criminal in nature. However, it is only once a criminal sentence has been imposed in a contempt proceeding (ancillary to a civil proceeding) that the proceeding assumes the quality of a criminal or quasi-criminal proceeding. Adkins v. Adkins, 29,088 (La.App. 2 Cir. 1/31/97), 687 So.2d 1109. There is no order of imprisonment in this case.

In Champagne, the defendant, a husband who owed alimony arrearages, was sentenced to 90 days "flat time" without any "purge clause," which is a provision in the contempt judgment that allows the defendant to avoid the imprisonment if he performs the required act or otherwise complies with the court's judgment. Mr. ***21** Champagne's 90 day sentence was not avoidable or limited by his payment of the outstanding alimony, and, therefore, this court struck down the sentence.

The Jumonvilles' situation is far different. The judgments here have a self operating "purge clause" regarding the fines: finish the house according to the deadlines, and fines will either not accrue or will stop accruing.

The Jumonvilles' argument regarding imprisonment is premature. The June 16, 1997 Judgment of Contempt ordered the parties to reconvene on June 13, 1997, [FN6] to determine possible jail sentences to be given defendants in this matter. This hearing was postponed until June 20, 1997, and was ultimately stayed by this court's order of June 20, 1997. No hearing has been held and no imprisonment has been ordered. Therefore, the Jumonvilles' assignments of error related to imprisonment are premature at best. Until such time as this court is presented with a lower court order actually ordering the Jumonvilles' imprisonment for contempt of court, we find these issues are premature and decline to review them at this time. [FN7]

> FN6. Evidently, the judgment signed June 16 was actually prepared prior to June 13th.
>
> FN7. We take judicial notice of LSA-C.C.P. art. 226, which allows the court to order imprisonment of a person found in contempt "when a contempt of court consists of the omission to perform an act which is yet in the power of the person charged with contempt to perform." The Jumonvilles' contempt consists of failure to meet the deadlines found in the February 22, 1996, October 23, 1996, and January 23, 1997 court orders, which are acts in the power of the Jumonvilles.

Next, the Jumonvilles argue that the evidence fails to show that they have deliberately refused to comply with the court's orders. With this we will also consider the Jumonvilles argument that the judge should not **235 have included rain days as work days in her fine for contempt.

[26] The Jumonvilles have attached a number of documents to their supplemental brief. However, we are unable to determine whether this documentary evidence was introduced at the May 23, 1997 hearing, because the transcript contains only the *22 judge's ruling. Likewise, the exhibits themselves are not stamped or marked in any way to show that they might have been introduced into evidence at the hearing. As such, we cannot determine if the judge used this evidence in arriving at her judgment. This court is prohibited from considering evidence not presented to the trial court. LSA- C.C.P. art. 2164.

In the transcript, the judge notes that she added up the building expenses submitted by the Jumonvilles. (This evidence, which was considered by the trial court, is not attached to the Writ Application or otherwise in the record.) She notes that the first check is dated January 24, 1997, the day after the last contempt ruling. The amounts add up to around $4000, or approximately $1000 per month. The judge felt that these were very inadequate expenditures on a home that needed the amount of work to finish in the time frame under the judgments. She reviewed photographs and found that only the pilings had been completed and scaffolding erected, but virtually nothing else had changed on the exterior of the house, since the last hearing in January.

[27] Without a transcript and a knowledge of what evidence the judge reviewed, we cannot say that the trial court erred in its determinations. We find convincing the judge's statement that the photographs reflect only new scaffolding and not new work on the home.

We note that the January 23, 1997 judgment, which imposes the $50 per day fine for noncompletion, does

not exclude rain days. The October 23, 1996 judgment, which contains a detailed fine schedule, delineates $50 per day fines based upon a five day work week and excludes legal holidays. It, too, does not exclude rain days, only weekends and holidays. Nor did the Consent Judgment exclude rain days. In the transcript of the hearings on October 4 and 17, 1996, Mr. Jumonville admits he *23 knew the Consent Judgment did not provide for rain days. Therefore, the Jumonvilles were on notice that rain days were not "excused".

[28] Last, the Jumonvilles argue that the next hearing in the trial court must be conducted by another trial judge. However, the cases they cite address direct contempt of court, which is an act of contempt committed in the immediate view and presence of the court. LSA-C.C. art. 222. Hearings on direct contempt must be conducted by a different judge than whom the act constituting the contempt was directed against. The Jumonvilles have been found to have committed acts of constructive contempt of court, and thus their argument is misplaced. The law does not require these hearings to be held before a different judge than the one whose judgment or order was disobeyed.

[29] The Jumonvilles' argument in brief alleges the bias of the trial judge because she has found the Jumonvilles in contempt of court each time Kenner has filed a Motion for Contempt. An unfavorable ruling, and even several, is not evidence of a trial judge's bias against a party. If the Jumonvilles believe the trial court is biased against them, they should follow the procedure in the trial court for the recusal of trial judges. These procedures are found in LSA-C.C.P. art. 151 et seq.

Conclusion

We affirm the trial court's judgment of October 23, 1996, but amend that portion of the judgment reflecting that the fine for contempt of court is lowered to $500.00 and to reflect that payment should be made to the 24th Judicial District Court, not to the City of Kenner. We further find that on the two Writ Applications, the Jumonvilles have not made the requisite showing that the trial court's judgments of contempt are erroneous, and we deny the Writ Applications.

*24 The parties share a mutual goal, the completion of the Jumonvilles' residence. The time, energy and expense incurred by the Jumonvilles in this litigation could have **236 been better directed towards the accomplishment of that goal.

AFFIRMED AS AMENDED; WRIT APPLICATIONS DENIED.

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694 So.2d 221
(Cite as: 97-1318 (La. 5/22/97), 694 So.2d 221)

CITY OF KENNER
v.
Jan P. Jumonville, Wife of and Placide J. JUMONVILLE.

No. 97-CC-1318.

Supreme Court of Louisiana.

May 22, 1997.

In re Jumonville, Jan P.; Jumonville, Placide J.;--Defendant(s); applying for supervisory and/or remedial writs; to the Court of Appeal, Fifth Circuit, No. 97-CW-0426; Parish of Jefferson, 24th Judicial District Court, Div. "I", No. 481-536.

Stay order denied. Writ denied.

CALOGERO, C.J., not on panel.

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THE SUPREME COURT OF THE STATE OF THE STATE OF LOUISIANA

City of Kenner

vs. NO. 97-C - 2890

JAN P. JUMONVILLE, WIFE OF AND PLACIDE J. JUMONVILLE

IN RE: Jumonville, Jan P.; Jumonville, Placide J.; - defendant(s); Applying for supervisory and/or Remedial Writs; Parish of Jefferson, 24th Judicial District Court Div. "I" Number 481-536; to the Court of Appeal, Fifth Circuit, Number 97-CA-0125, 97-CW-0210, 97-CW-0602

January 30, 1998

Denied.

HTL
PFC
WFM
CDK
BJJ
JPV
JTK

TRAYLOR, J. not on panel

Supreme Court of Louisiana
January 30, 1998

/s/
Deputy Clerk of Court
For the Court

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